SLUT-SHAMING IN THE WORKPLACE: SEXUAL RUMORS & HOSTILE ENVIRONMENT CLAIMS

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ABSTRACT

"Slut-shaming" is the act of criticizing a woman for her real or perceived sexual promiscuity. Until now, much scholarship and journalism has focused on the slut-shaming of school-aged girls and young women. This article broadens the discussion about this harassing behavior by illuminating an overlooked area: slut-shaming in the American workplace. This article focuses on how courts have dealt with hostile work environment cases based in whole or in part on rumors about adult women's alleged sexual promiscuity. In particular, courts have struggled with how to interpret Title VII's seemingly simple requirement that conduct occur "because of" sex. Courts have often failed to recognize the gendered aspect of sexual rumors about women. Due to the continued existence of the sexual double standard, rumors about women who engage in sex acts with men penalize women for violating gender norms.

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I.
INTRODUCTION

> "[W]hen you want to put down or undermine a woman, accusing her of being slutty works every time."[1]

Workplace rumors about a woman's real or perceived sexual promiscuity can create a hostile work environment in violation of Title VII. A rumor that a woman is sexually promiscuous is a gender-based insult because it censures a woman for violating the sexual double standard. Sexual rumors can undermine a woman's credibility and call into question her achievements in the workplace. Research shows that people perceive women who they believe have violated the sexual double standard as less competent.[2] Courts' treatment of such sexual rumors has been inconsistent: some courts recognize the gender-based nature of the harassing behavior while others have failed to recognize that rumors about sexual promiscuity are uniquely degrading and insulting to women because of the sexual double standard. This article addresses why workplace rumors about women's[3] sexual promiscuity satisfy Title VII's requirement that the harassing conduct occurred "because of" sex.

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1. LEORA TANENBAUM, I AM NOT A SLUT 40 (2015) [hereinafter TANENBAUM, I AM NOT A SLUT].

2. *See infra* Part III.A.

3. The article primarily focuses on cases involving sexual rumors about women because the vast majority of the sexual rumors cases are filed by female plaintiffs. The author reviewed sixty-five published and unpublished federal court Title VII cases where rumors comprised all or part of the alleged sexually harassing conduct. Only six of those cases involved allegations by male plaintiffs that they had been the subject of sexual rumors. *See* Venezia v. Gottlieb Mem'l Hosp., Inc., 421 F.3d 468 (7th Cir. 2005) (male and female plaintiffs were subject of sexual rumors); McDonnell v. Cisneros, 84 F.3d 256 (7th Cir. 1996) (male and female plaintiffs were subject of sexual rumors); Pasqua v. Metro. Life Ins. Co., 101 F.3d 514 (7th Cir. 1996) (male plaintiff was subject of sexual rumors); Torres v. Quatro Composites, L.L.C., 902 F. Supp. 2d 1152 (N.D. Iowa 2012) (male plaintiff was subject of sexual rumors); Wirtz v. Kansas Farm Bureau Servs., *Inc.* 274 F. Supp. 2d 1198 (D. Kan. 2003) (male plaintiff was subject of sexual rumors); Dellefave v. Access Temps., Inc. No. 99 CIV. 6098RWS, 2001 WL 25745 (S.D.N.Y. Jan. 10, 2001) (male plaintiff was subject of sexual rumors). A complete list of the sixty-five cases is available upon request from the author.

This is consistent with the fact that, overall, women more frequently file sexual harassment charges. The overwhelming majority of sexual harassment charges filed with the EEOC and state and local fair employment practice agencies are filed by women. *See Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997 – FY 2011*, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited Mar. 16, 2016). However, the number of charges filed by men has risen since the EEOC first began collecting data. Charges filed by men constituted 9.1% of the total charges in 1992 and 16.3% in 2011. *Id.*; *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1992 – FY 1996*, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment-a.cfm (last visited Mar. 16, 2016). *See also*, Margaret S. Stockdale, Michelle Visio, & Leena Batra, *The Sexual Harassment of Men: Evidence for a Broader Theory of Sexual Harassment and Sex Discrimination*, 5 PSYCHOL. PUB. POL.'Y. & L. 630, 630 (1999) ("Women are far more likely than men to experience sexual harassment."). Because women file the majority of claims, this article will use female pronouns when discussing sexual harassment victims.

The most extensive treatment of sexual rumors, to date, occurs in those court opinions analyzing rumors about women's sexual activity. Certainly, male and transgender employees can

The sexual double standard is a "moral code that permits sexual freedom and promiscuity for men but not for women."[4] Despite American society's increasingly relaxed attitudes about sexual behavior,[5] women are still viewed differently than men for engaging in the same behavior. A woman who engages in sexually promiscuous behavior with a man is shamed; she is deemed a "slut." A man who engages in the same sexually promiscuous behavior with a woman is celebrated for his sexual prowess; he is considered a "stud."[6] A flippant—yet apt—definition that encapsulates the sexual double standard is that a "slut" is "a woman with the morals of a man."[7]

Contemporary feminists refer to the practice of criticizing a woman's real or perceived sexual promiscuity as "slut-shaming." Feminist blogger Andrea Rubenstein defines slut-shaming as "the idea of shaming and/or attacking a woman or girl for being sexual, having one or more sexual partners, acknowledging sexual feelings, and/or acting on sexual feelings."[8] It is "sexist because only girls and women are called to task for their sexuality, whether real or imagined; boys and men are congratulated for the exact same behavior. This is the essence of the sexual double standard: boys will be boys, and girls will be sluts."[9] Rubenstein notes, "in many cases, the so-called slut's actual sexual behavior is nonexistent or irrelevant."[10] The practice reinforces the sexual double standard by intentionally targeting a woman who "does not adhere to feminine norms."[11]

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also be victims of sexual rumors. Some of these male plaintiff cases are discussed in the article. *See infra*, Part IV.B.1.a. The author did not identify any published or unpublished federal cases involving rumors about a transgender individual's sexual activity.

4. *Double Standard of Sexual Behavior*, THE AMERICAN HERITAGE NEW DICTIONARY OF CULTURAL LITERACY, (3d ed.), http://dictionary.reference.com/browse/double+standard+of+sexual+behavior (last visited Mar. 16, 2016).

5. *See, e.g.*, Jean M. Twenge, Ryne A. Sherman, & Brooke E. Wells, *Changes in American Adults' Sexual Behavior & Attitudes, 1972–2012*, 44 ARCH. SEX. BEHAV. 2273, 2281 (2015) (concluding that "more Americans believe that sexuality need not be restricted by social conventions").

6. *See generally*, JESSICA VALENTI, HE'S A STUD, SHE'S A SLUT, AND 49 OTHER DOUBLE STANDARDS EVERY WOMAN SHOULD KNOW (2009).

7. *Slut*, URBAN DICTIONARY, http://www.urbandictionary.com/define.php?term=slut (last visited Mar. 16, 2016).

8. Andrea Rubenstein (AKA Tekanji), *FAQ: What is "Slut Shaming?"*, FINALLY A FEMINISM 101 BLOG (Apr. 4, 2010), https://finallyfeminism101.wordpress.com/2010/04/04/what-is-slut-shaming/. *See also* Leora Tanenbaum, *The Truth About Slut-Shaming*, THE HUFFINGTON POST (Apr. 15, 2015), http://www.huffingtonpost.com/leora-tanenbaum/the-truth-about-slut-shaming_b_7054162.html ("Slut-shaming is the experience of being labeled a sexually out-of-control girl or woman (a 'slut' or 'ho') and then being punished socially for possessing this identity."); Emily Lindin, *5 Ways You Can Stop Slut Shaming Today*, THE EIGHTY8, http://www.theeighty8.com/5-ways-you-can-stop-slut-shaming-today/ (last visited March 16, 2016) (Slut-shaming "involves suggesting that a girl or woman should feel guilty or inferior for her real—or perceived—sexual behavior.").

9. Tanenbaum, *supra* note 8.

10. TANENBAUM, I AM NOT A SLUT, *supra* note 1 at XVII.

11. *Id.* at 68.

Although recent attention has focused on the problem of slut-shaming among adolescents,[12] the behavior is not limited to teenagers. Slut-shaming can also occur in the workplace.[13] The behavior frequently manifests in the form of spreading rumors[14] that a female employee has engaged in sexually promiscuous behavior with a male superior or male coworker.[15] For example, Marcela Fuentes, a twenty-one year old who worked as a part-time cashier for AutoZone, became the subject of humiliating workplace sexual rumors.[16] After Ms. Fuentes came to work with a fever blister on her lip, her male supervisors spread rumors that she had herpes and that she had contracted it by performing oral sex on a male coworker.[17] The rumor spread quickly among employees, so much so that Ms. Fuentes heard the rumor repeated back to her by an employee at another AutoZone store.[18]

Workplace rumors about a woman's alleged sexual promiscuity are not simply embarrassing invasions of privacy;[19] they are gender-based insults. Many, perhaps most, employees do not choose to make their personal sexual conduct a matter of public discussion in the workplace. Sexual rumors invade

12. *See, e.g.*, TANENBAUM, I AM NOT A SLUT, *supra* note 1; SLUT: A PLAY AND GUIDEBOOK FOR COMBATING SEXISM AND SEXUAL VIOLENCE (Katie Cappiello & Meg McInerney eds., 2015); EMILY WHITE, FAST GIRLS: TEENAGE TRIBES AND THE MYTH OF THE SLUT (2002); LEORA TANENBAUM, SLUT!: GROWING UP FEMALE WITH A BAD REPUTATION (2000).

13. *See infra* Part IV.

14. Slut-shaming takes different forms and occurs whether or not the epithet "slut" is actually used to describe the woman. Rubenstein, *supra* note 8. Other ways to deride a woman for her real or perceived sexual behavior include posting nude photos of her online without her permission and spreading rumors that she has engaged in sexually promiscuous behavior. *See, e.g.*, Tanenbaum, *supra* note 8 (referring to posting nude photographs of a woman on social media without her consent).

The term "rumor" is used to refer to statements made to others about someone's private or personal matters. Some experts differentiate between the terms "rumor" and "gossip." *See, e.g.*, NICHOLAS DIFONZO, THE WATERCOOLER EFFECT 16, 61 (2008) (distinguishing rumors as *unverified* informational statements, and gossip as idle, often derogatory, social chatter); ALLEN J. KIMMEL, RUMORS AND RUMOR CONTROL 25–26 (2004) (defining gossip as "idle or apparently trivial conversation about the private, personal qualities or behaviors of others," and "rumor" as an "unconfirmed proposition" that concerns a topic of significance; acknowledging that "the spread of more titillating organizational hearsay, such as speculation about the sexual exploits or predilections of an employee or the assertion that two coworkers are romantically involved . . . is more likely to be labeled as gossip, although the distinction is often a difficult one to make, particularly when the communication spreads through the office grapevine"). However, it is not necessary to make a distinction between the two terms in this article. Dictionary definitions tend to use the terms synonymously. *See, e.g.*, *Rumor*, DICTIONARY.COM http://www.dictionary.com/browse/rumor?s=t (last visited June 21, 2016) (defining rumor as "gossip; hearsay"); *Gossip*, DICTIONARY.COM, http://www.dictionary.com/browse/gossip?s=t (last visited June 21, 2016) (defining gossip as "idle talk or rumor, especially about the personal or private affairs of others").

15. *See infra* Part IV.

16. Fuentes v. Autozone, Inc., 200 Cal. App. 4th 1221 (2011).

17. *Id.* at 1224–30.

18. *Id.* at 1229.

19. People's sexual activities are quintessentially private matters. *See* Lisa R. Pruitt, *Her Own Good Name: Two Centuries of Talk About Chastity*, 63 MD. L. REV. 401, 407 (2004) (discussing the "quintessentially private" nature of women's "sexual personhood").

that privacy and most likely convey false information while doing so.[20] They also accuse the woman of violating the sexual double standard, of being a "slut."

Part II of the article will review the origins and requirements for a hostile work environment claim and specifically discuss Title VII's "because of" sex requirement. Part III will summarize social science research that confirms the continued existence of a sexual double standard. In Part IV, the article will examine hostile work environment cases that have included rumors about sexual promiscuity and analyze how the courts have addressed the "because of" sex requirement. Finally, in Part V, the author offers recommendations for how courts should treat sexual rumors for purposes of the "because of" sex requirement in hostile work environment cases.

II.
TITLE VII'S "BECAUSE OF" SEX REQUIREMENT IN SEXUAL HARASSMENT CASES

In order to contextualize the discussion of Title VII cases about sexual rumors, it is helpful to first review Title VII's history and the current test for a hostile work environment claim, focusing in particular on the requirement that harassment occur "because of" the plaintiff's sex. This section will end with a description of the variety of evidentiary routes courts use to determine whether conduct occurred "because of" sex as well as describe a stumbling block for some courts—the so called "equal opportunity harasser."

A. Title VII's Origin and Hostile Work Environment Claim Requirements

Title VII originated as part of the Civil Rights Act of 1964, an omnibus civil rights bill primarily concerned with race discrimination in a variety of circumstances, including employment, voting, public accommodations, and public education.[21] Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[22] Little legislative history exists about the prohibition against discrimination because of "sex" because the category was added as a last minute amendment on the floor of the House of Representatives.[23] Title VII's language

20. With very few exceptions, the vast majority of the rumors in the federal Title VII sexual rumor cases reviewed for this article involve false or unverified rumors. *But see* Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 999, 1001 n. 1 (10th Cir. 1996) (rumors about plaintiff's sexual relationship with her boss based on strong evidence); Nash v. New York State Exec. Dept., Div. of Parole, No. 96 CIV. 8354(LBS), 1999 WL 959366 at *1 (S.D.N.Y. Oct. 20, 1999) (addressing a rumor that female plaintiff had been a prostitute in the past (true) and that she was recruiting her female coworkers to work as prostitutes (untrue)).

21. BARBARA T. LINDEMANN & DAVID D. KADUE, WORKPLACE HARASSMENT LAW 1–2 (2d ed. 2012).

22. 42 U.S.C. § 2000e-2(a)(1) (1991).

23. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63–64 (1986) (citing 110 Cong. Rec.

forbids "discrimination" but does not use the terms "harassment" or "hostile environment." It took several years after Title VII's passage for courts to recognize sexual harassment as a form of employment discrimination. Since doing so, courts have expanded their understanding of what "because of" sex means to include sexual advances as well as gender-based harassment.

The Supreme Court first recognized sexual harassment as a type of sex discrimination in 1986. In *Meritor Savings Bank v. Vinson*,[24] the Court rejected the employer's argument that Title VII applies only to tangible job benefits or other economic barriers and not to "'purely psychological aspects of the workplace environment.'"[25] The Court reasoned that the phrase "terms, conditions, or privileges of employment" in Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment" and the language is not limited to "economic" or "tangible" discrimination.[26]

To prove a hostile environment claim based on sexual harassment under current law, harassing conduct must be unwelcome,[27] "because of . . . sex,"[28] and "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[29] The environment must be both subjectively offensive to the victim and also objectively offensive to a reasonable person.[30] The employer is responsible for the hostile work environment if it knew or should have known about the harassment and failed to take proper action.[31]

Acknowledging that, "by its nature," the inquiry into whether an environment is hostile or abusive cannot be "a mathematically precise test," the Supreme Court has emphasized the importance of looking at the totality of the circumstances.[32] Factors to consider include: "the frequency of the

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2577–2584) (1964)); *see also* LINDEMANN & KADUE, *supra* note 21 at 1-2 to -3 (describing legislative history of the addition of "sex" to the Civil Rights Act of 1964).

24. *Id.* at 66 ("plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.") Some lower courts had already recognized hostile work environment claims under Title VII but this was the first time the U.S. Supreme Court considered the issue. *See* LINDEMANN & KADUE, *supra* note 21 at 19-3 to -4 (summarizing early judicial decisions recognizing harassment claims).

25. *Meritor*, 477 U.S. at 64 (quoting Petitioner's Brief at 30–31). The employer conceded that a supervisor who sexually harasses an employee because of the employee's sex discriminates on the basis of sex. *Id.*

26. *Id.* at 64 (internal citations and quotation marks omitted).

27. *Id.* at 68; 29 C.F.R. § 1604.11(a) (1997) (detailing when "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" may "constitute sexual harassment").

28. 42 U.S.C. § 2000e-2(a)(1) (1991); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998).

29. *Meritor*, 477 U.S. at 67.

30. *Id.* at 21–22.

31. 29 C.F.R. § 1604.11(d) (1997).

32. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22–23 (1993).

discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[33] However, "no single factor is required."[34] The Supreme Court has also emphasized that the test for a hostile work environment is meant to ensure that Title VII is not a "general civility code."[35] Applied properly applied, these standards "will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'"[36]

B. Title VII's "Causation" Requirement: "Because of" Sex

Title VII does not prohibit all harassing conduct. Rather, the harassing conduct must be "because of" sex.[37] This seemingly simple causation requirement has proven conceptually challenging; courts' interpretations of it have often made it more difficult for plaintiffs to obtain a judicial remedy.[38] Scholar David S. Schwartz points out that calling the "because of" sex requirement "causation" may be "something of a misnomer."[39] In tort cases, causation refers to "whether the defendant's negligent or intentional act caused damage to the plaintiff."[40] But "[i]n discrimination cases, the relationship between the defendant's action and harm to the plaintiff is usually not in controversy."[41] Instead, "the question is whether the 'cause' of the defendant's act was the protected characteristic of the plaintiff." In other words, the pertinent inquiry is "whether the harm to the plaintiff was discriminatory in nature."[42]

A comprehensive solution to the interpretive difficulties that the "because of" requirement poses is beyond the scope of this article. Several scholars have

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33. *Id.* at 23.

34. *Id.*

35. *Oncale*, 523 U.S. at 81.

36. Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (quoting B. LINDEMANN & D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW, *supra* note 21, at 175).

37. *Oncale*, 523 U.S. at 80 ("Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at '*discriminat[ion]* . . . because of . . . sex.'").

38. *See, e.g.*, Deborah Zalesne, *Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes*, 14 DUKE J. GENDER L. & POL'Y 535, 545 (2007) ("The question of the underlying cause of harassment has led to great confusion and disagreement among both courts and commentators."); Andrea Meryl Kirshenbaum, *"Because of . . . Sex": Rethinking the Protections Afforded Under Title VII in the Post-Oncale World*, 69 ALB. L. REV. 139, 173 (2006) ("As a review of jurisprudence illustrates, . . . there is a consensus about [Title VII's] 'because of . . . sex' requirement, and that consensus is that no court truly knows what it means."); David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1709 (2002) ("When courts or commentators discuss whether an act of harassment is 'because of sex[']. . . there is a great likelihood that the discussion will either be misunderstood or analytically faulty.").

39. Schwartz, *supra* note 38, at 1710.

40. *Id.*

41. *Id.*

42. *Id.*

proposed thoughtful remedies in response to that broader problem.[43] Rather, this article's purpose is to demonstrate that courts can and should, even under existing jurisprudence, determine that sexual rumors are "because of" sex and proceed to examine the conduct under the remaining hostile environment claim elements (unwelcome, severe or pervasive, and employer liability).

The following subsections discuss the "because of" sex requirement in greater depth in order to establish the broader context in which sexual rumor cases are decided: (1) the reasons for confusion about the "because of" sex requirement; (2) evidentiary routes courts use to demonstrate that harassing conduct occurred "because of" sex; and (3) the "equal opportunity harasser" problem.

1. Bedeviled: Confusion About the Term "Sex" and Required Discriminatory Intent

The ambiguity of the term "sex" and the uncertainty about the level of required "discriminatory 'intent'" are among the "confusing issues bedeviling sexual harassment law."[44] Title VII does not define "sex" other than to indicate that it includes pregnancy.[45] The term "sex" is subject to different meanings. Courts may use it narrowly to refer to a person's biological sex (male or female).[46] Courts sometimes use the term "gender" synonymously with "sex" although the terms relate to different concepts.[47] Gender is a broader concept that refers to "the behavioral, cultural, or psychological traits typically associated with one sex."[48] Some courts have purposefully used this broader concept when interpreting the "because of" sex requirement.[49] Finally, the term "sex" can also

43. *See, e.g.*, Kirshenbaum, *supra* note 38; L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. KAN. L. REV. 341, 341 (2005) [hereinafter Hébert, *Disparate Impact*]; Martin J. Katz, *Reconsidering Attraction in Sexual Harassment*, 79 IND. L. J. 101 (2004); Robert A. Kearney, *The Unintended Hostile Environment: Mapping the Limits of Sexual Harassment Law*, 15 BERKELEY J. EMP. & LAB. L. 87 (2004); Schwartz, *supra* note 38; L. Camille Hébert, *Sexual Harassment as Discrimination "Because of . . . Sex": Have We Come Full Circle?*, 27 OHIO N.U. L. REV. 439 (2001) [hereinafter Hébert, *Full Circle*].

44. Schwartz, *supra* note 38, at 1705.

45. 42 U.S.C. § 2000e(k) (1991) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions[.]"). Section 2000e(k) was not part of the original Civil Rights Act of 1964; rather, it was added in 1978 as part of the Pregnancy Discrimination Act. Pub. L. No. 95–555, 92 Stat. 2076 (1978).

46. *See* Zalesne, *supra* note 38, at 545.

47. *See* Zalesne, *supra* note 38, at 546; Schwartz, *supra* note 38, at 1706. *See also*, *Sex*, BLACK'S LAW DICTIONARY (10th ed. 2014) (including "gender" in definition of "sex").

48. *See Gender*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, (11th ed. 2003). *See also* LINDEMANN & KADUE, *supra* note 22, at 8-14 (defining gender as "includ[ing] both the biological and the cultural differences between men and women").

49. *See* discussion *infra* Part II.B.2.

refer to sexual behavior; i.e., "physical sexual acts or communicative acts depicting sexual acts."[50]

Although the term "because of" requires linkage between the plaintiff's protected status and the harassing conduct, it does not make clear what level of discriminatory intent will suffice. The question of discriminatory intent is made all the more difficult when considering motivations behind harassing behavior, as opposed to legitimate business-related decisions. Harassment cases differ from discrimination cases where an employer has made a business-related decision, such as hiring, firing, or promotion, because harassing actions are not productive, legitimate business-related decisions.[51] Therefore, "nonrational, harassing actions" are more likely to reflect "unconscious bias, since there is no call to engage in a conscious process of reasoned decision-making in order to harass."[52] Many, "perhaps most, harassers may well act out of intentional but unconscious bias based on a lack of self-awareness or reflection."[53] If "because of" is interpreted to require a *conscious* motive to harass someone "because of" her sex, it incorrectly assumes that most harassers are self-aware enough to articulate a conscious motive. For example, it is conceivable that a harasser can commit an intentional act—such as using an epithet or making a sexual advance—without awareness that the act was *motivated by* hostility to a woman in the workplace.[54]

Focus on the harasser's conscious motive is inconsistent with the law's emphasis on *environment* as the critical issue in sexual harassment cases. The Supreme Court has said that harassment is "because of" sex if "'members of one sex are *exposed* to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'"[55] In *Meritor*, relying on EEOC sexual harassment regulations, the Court stated that a hostile environment results from conduct that "has the purpose *or effect* of . . . creating an intimidating, hostile, or offensive working environment."[56] Both the Supreme Court's terminology and also the EEOC regulations suggest that conscious motivation is not required to meet the causation requirement. Courts can and should examine

50. Schwartz, *supra* note 38, at 1707. Sexual behavior is a closely related concept to sexual orientation. Sexual orientation is not yet recognized as within the definition of "sex" under Title VII. *See* LINDEMANN & KADUE, *supra* note 21, at 17-14 (summarizing decisions holding that Title VII does not recognize discrimination on the basis of sexual orientation). *But see* Baldwin v. Dep't of Transportation, EEOC Appeal No. 0120133080 (July 15, 2015) (holding that discrimination on basis of person's sexual orientation is discrimination because of sex).

51. Schwartz, *supra* note 38, at 1718.

52. *Id.*

53. *See id.*

54. *Id.*

55. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) (emphasis added)).

56. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. § 1064.11(a)) (emphasis added). *See also Harris*, 510 U.S. at 25 (1993) (Ginsburg, J., concurring) ("The adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance.").

more than just the harasser's conscious, articulated motivations; courts should also review the motivations suggested by his conduct and the results that his conduct has on the victim's workplace.[57]

A harasser's subjective motive is also a murky inquiry. A harasser may have multiple motives without being consciously aware of some or even all of them. For example, harassment might be motivated by misogyny, sexual desire, personal dislike of certain types of women, personal dislike of the plaintiff specifically, or jealousy. Harassment can still be "because of" sex even if there is more than one motive. Title VII recognizes that an employment practice may involve "mixed motives" where the plaintiff's protected characteristic was a "motivating factor."[58] In *E.E.O.C. v. Abercrombie & Fitch Stores*, a Title VII religious disparate treatment case decided in 2015, the Supreme Court clarified that Title VII's "because of" causation requirement is more relaxed than "the traditional standard of but-for causation."[59] The Court explained that:

> Title VII relaxes [the causation] standard to prohibit even making a protected characteristic a "motivating factor" in an employment decision. "Because of" in § 2000e–2(a)(1) links the forbidden consideration to each of the verbs preceding it; an individual's actual religious practice may not be a motivating factor in failing to hire, in refusing to hire, and so on.[60]

2. Common Evidentiary Routes Courts Use to Draw an Inference that Harassing Conduct Occurred "Because of" Sex

Because motive is rarely explicit, courts consider various evidentiary routes to draw an inference that conduct occurred "because of" sex. In *Oncale v. Sundowner Offshore Services*, where the Supreme Court recognized same-sex sexual harassment, the Court detailed three evidentiary routes to finding a causal connection between the harassment and a plaintiff's sex: (1) desire-based "explicit or implicit proposals of sexual activity"; (2) "sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace"; and (3) "direct comparative evidence about how the alleged harasser treated members of both

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57. *See, e.g.*, Winsor v. Hinckley Dodge, 79 F.3d 996, 1000 (10th Cir. 1996) ("even if the motivation behind the plaintiff's mistreatment was gender neutral . . . the manner in which her coworkers expressed their anger and jealousy was not. Rather, plaintiff's coworkers often chose sexually harassing behavior to express their dislike of plaintiff, conduct which would not have occurred if she were not a woman.").

58. Title VII of the Civil Rights Act of 1964 § 703(m), 42 U.S.C. § 2000e-2(m). *See, e.g.*, Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138, 144 (4th Cir. 1996) (holding that Title VII claim still actionable although harassment occurred because of sex and also because of the plaintiff's sexual orientation).

59. E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2032 (2015).

60. *Id.* (quoting 42 U.S.C. § 2000e–2(m)). It will be interesting to see how this decision impacts the circuits that use a "but for" causation test in sexual harassment cases. *See also* LINDEMANN & KADUE, *supra* note 21, at viii (Judge Cudahy's forward discusses the adequacy of the "but for" approach, suggesting it is vulnerable to change).

sexes in a mixed-sex workplace."[61] The Court did not indicate that this was an exhaustive list of potential evidentiary routes. Indeed, lower courts have used the *Oncale* evidentiary routes as instructive rather than exhaustive.[62] Some courts have also recognized harassing behavior that reflects gender-based stereotyping.[63]

The *Oncale* evidentiary routes are discussed briefly below, as well as some additional methods of proof that federal courts have recognized. Because of the nature of harassing conduct, the evidentiary routes are not mutually exclusive (or, as noted, exhaustive). It is possible that a plaintiff will experience several different types of harassing conduct that fall into more than one of the following categories.

a. Sexual Conduct

Even before *Oncale*, the Supreme Court has been willing to view sexual conduct as satisfying the "because of" sex requirement. In *Meritor Savings*, the Supreme Court appeared to view the sexually explicit conduct directed at the plaintiff, which included demands for sexual favors, exhibitionism, and even multiple instances of rape, as sufficiently "because of" sex. Citing E.E.O.C. Guidelines, the Court observed that actionable conduct can include "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[64]

Building upon *Meritor Savings*, the *Oncale* Court recognized that sexual conduct can provide the requisite evidence to establish that harassment occurred "because of" sex, but it emphasized the harasser's sexual desire to succeeding under this route, at least in same-sex harassment cases. The Court cautioned that it has "never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."[65] The Court recognized that "explicit or implicit proposals of sexual activity" in a same sex harassment situation would "support an inference of discrimination on the basis of sex" if there were

61. *Oncale*, 523 U.S. at 80–81.

62. *See, e.g.*, Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999) (explaining there is "no singular means" of establishing the "because of sex" requirement).

63. *See infra* Part II.B.d.

64. *Meritor*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a) (1985)). The Court also observed that the Guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Id.* (internal citations and quotation marks omitted). After *Meritor*, lower courts also accepted sexual behavior as sufficient to satisfy the "because of" sex requirement. *See* Hébert, *Full Circle*, *supra* note 43 at 447 ("After Meritor, a number of lower courts seemed to assume that sexually-related behavior in the workplace automatically met the 'because of . . . sex' requirement.") Interestingly, before *Meritor*, some lower courts did not consider sexual activity to be "because of" sex, instead attributing the behavior to "personal" reasons such as sexual desire or personal animosity. *See* Hébert, *Disparate Impact*, *supra* note 43 at 341.

65. *Oncale*, 523 U.S. at 80.

"credible evidence that the harasser was homosexual."[66] The Court also observed that courts and juries have often found that inference "easy to draw in most male-female sexual harassment situations [] because the challenged conduct typically involves explicit or implicit proposals of sexual activity [and] it is reasonable to assume those proposals would not have been made to someone of the same sex."[67]

If *Oncale's* emphasis on *desire*-based sexual conduct is narrowly interpreted, it would unjustly exclude the harassing sexual conduct used to wield power over or otherwise degrade a victim rather than to express desire.[68] Several courts have eschewed a desire-based emphasis and found that non-desire-based sexual conduct can satisfy Title VII's "because of" sex causation requirement. Some courts have held that conduct that creates a "sexually charged workplace" can meet the causation requirement even if the harasser does not make sexual advances toward the plaintiff and even though the conduct was not desire-based.[69] In *Petrosino v. Bell Atlantic*, for example, the Second Circuit concluded that the depiction of female employees in "sexually demeaning" jokes and graphics "communicated the message that women as a group were available for sexual exploitation by men."[70]

b. Conduct that Reflects Gender-Based Hostility

Cognizant of the shortcomings of a requirement predicated on sexual desire, *Oncale* also explicitly recognized that "[h]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[71] Under *Oncale*, a plaintiff could also proffer that harassing conduct, even if nonsexual, demonstrates a "general hostility to the presence of [the victim's sex] in the workplace."[72] Recent research has found that gender-based harassment without a sexual behavior component is quite common; for example, it is "the most common manifestation of harassment faced by women" in the military and the law[73]

66. *Id.* Although *Oncale* may appear to be a victory for Mr. Oncale and other same sex harassment victims, the Court's emphasis on the harasser's sexual desire for the victim has the potential to be used against gays and lesbians; "there is a gay-bashing quality to a legal doctrine that seems to call for a 'homosexual' villain." Schwartz, *supra* note 38, at 1735.

67. *Id.*

68. Schwartz, *supra* note 38, at 1720–21 (quoting Katherine M. Franke, *What's Wrong with Sexual Harassment?,* 49 STAN. L. REV. 691, 743 (1997)).

69. *See* LINDEMANN & KADUE, *supra* note 21, at 8-27 to -31 (discussing sexually charged workplace cases).

70. Petrosino v. Bell Atl., 385 F.3d 210, 222 (2d Cir. 2004) (holding that the jury could have found that the conduct was "based on" the female plaintiff's sex because "[s]uch workplace disparagement of women . . . stands as a serious impediment to any woman's efforts to deal professionally with her male colleagues.").

71. *Oncale*, 523 U.S. at 80.

72. *Id.*

73. Emily A. Leskinen, Lilia M. Cortina & Dana B. Kabat, *Gender Harassment: Broadening*

Courts have found that conduct constituted harassment "because of" sex when it took the form of gender-specific insults and epithets.[74] In *Smith v. Sheahan*, the male harasser verbally harassed the female plaintiff and other female employees by calling them gender-specific insults, such as "bitch."[75] He also physically attacked the plaintiff severely enough to require surgery.[76] The Seventh Circuit held that "[i]t makes no difference that the assault and the epithets sounded more like expressions of sex-based animus rather than misdirected sexual desire . . . Either is actionable under Title VII as long as there is evidence suggesting that the objectionable workplace behavior is based on the sex of the target."[77] In addition, courts have also recognized that nonsexual and non-gender-specific harassing conduct can be "because of" sex. For example, threats, intimidation, physical violence, or generally making a plaintiff's work more difficult can all still satisfy Title VII's "because of" sex requirement.[78]

c. Comparative Evidence

Oncale also recognized that a plaintiff may use "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace" to demonstrate that harassing conduct was "because of" sex.[79] This evidentiary avenue provides potential refuge for a plaintiff who is treated more harshly then his or her counterpart of another gender but in nonsexual or non-gender-specific terms. In *E.E.O.C. v. National Education Association, Alaska*, the Ninth Circuit relied on comparative evidence in a case where the male supervisor bullied the female plaintiffs by shouting, using profanity and physical intimidation, and employing other nonsexual and non-explicitly-gender based conduct.[80] Although the harasser was also aggressive toward male employees, the court observed that the conduct differed in frequency, intensity, and impact.[81] The court reasoned that "there is no legal requirement that hostile acts be overtly sex- or gender-specific in content, whether marked by language, by sex or gender-stereotypes, or by sexual

Our Understanding of Sex-Based Harassment at Work, 35 L. & HUM. BEHAV. 25, 36 (2011).

74. *See* LINDEMANN & KADUE, *supra* note 21, at 8-17 to -18 ("Courts have found gender harassment based on epithets, slurs, or negative stereotyping, threats, intimidation, hostile acts, or physical assaults, written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of gender, and actions by a supervisor or coworker that make a plaintiff's work more difficult").

75. Smith v. Sheahan, 189 F.3d 529, 531 (7th Cir. 1999).

76. *Id.*

77. *Id.*

78. LINDEMANN & KADUE, *supra* note 21, at 8-17 to -19.

79. *Oncale*, 523 U.S. at 80–81.

80. E.E.O.C. v. Nat'l Educ. Ass'n, Alaska, 422 F.3d 840, 844 (9th Cir. 2005) [hereinafter *E.E.O.C. v. N.E.A.*].

81. *Id.* at 845–47.

overtures. While sex- or gender-specific content is one way to establish discriminatory harassment, it is not the only way."[82]

d. Nonconformity with Gender Stereotypes

Although *Oncale* did not address an evidentiary route where a plaintiff can demonstrate causation in a sexual harassment case due to nonconformity with gender roles,[83] the Supreme Court has addressed this type of motive in the employment discrimination context. In *Price Waterhouse v. Hopkins,* a Title VII case in which the plaintiff alleged that her employer failed to promote her due to her sex, the Supreme Court recognized gender stereotyping as actionable discrimination.[84] The Court found that plaintiff Ann Hopkins was denied a partnership based at least in part on her nonconformity with female stereotypes: she was described as "macho," told to take "a course at charm school," and advised to "walk more femininely, talk more femininely, dress more femininely, wear-make-up, have her hair styled, and wear jewelry."[85]

Since *Price Waterhouse*, some lower courts have recognized harassing behavior due to gender stereotypes as an actionable sexual harassment claim. These cases frequently involved a male plaintiff who was harassed because he did not conform to masculine gender stereotypes.[86] In *Nichols v. Azteca Restaurant Enterprises*, the Ninth Circuit considered a male plaintiff's sexual harassment claim based on verbal harassment by his male colleagues.[87] His male coworkers and a male supervisor referred to the plaintiff using female pronouns ("she" and "her"), mocked him for behaving like a woman, and "derided him for not having sexual intercourse" with a female employee.[88] They also called him derogatory names that compared him to a woman (e.g., "female whore") and questioned his sexual orientation (e.g., "faggot").[89] The court held that *Price Waterhouse's* "rule that bars discrimination on the basis of sex stereotypes" applied to the verbally harassing conduct toward the male plaintiff, which therefore satisfied the "because of" sex requirement.[90]

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82. *Id.* at 844.

83. Indeed, although amicus briefs filed in support of *Oncale* raised a sex-stereotyping theory of sexual harassment, the Court avoided addressing that theory. *See* Schwartz, *supra* note 38, at 1742–43.

84. Price Waterhouse v. Hopkins, 490 U.S. 228, 250–52 (1989).

85. *Id.* at 235.

86. *See* LINDEMANN & KADUE, *supra* note 21, at 8-41 to -52 (discussing sexual stereotyping decisions from circuit courts).

87. Nichols v. Azteca Rest. Enters., 256 F.3d 864, 869 (9th Cir. 2001).

88. *Id.* at 870, 874.

89. *Id.* at 870.

90. *Id.* at 874–75. Claims based on nonconformity with gender stereotypes are increasingly recognized by the E.E.O.C. and courts, including in sex discrimination cases brought by transgender plaintiffs. *See, e.g.*, Schroer v. Billington, 577 F. Supp. 2d 293, 305 (D. D.C. 2008) (holding transgender plaintiff entitled to judgment based on *Price Waterhouse* sex stereotyping theory); Macy v. Holder, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012) (ruling

3. The "Equal Opportunity Harasser" Problem

Before and after *Oncale*, some courts have concluded that when both male and female employees are harassed, the harassment did not occur "because of" sex.[91] In *Holman v. Indiana*, the Seventh Circuit affirmed the dismissal of sexual harassment claims brought by a husband and wife who alleged that their male supervisor made sexual advances toward both of them.[92] The Court reasoned that "Title VII does not cover the 'equal opportunity' . . . harasser because such a person is not discriminating on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly)."[93]

Scholars have critiqued this "equal opportunity harasser" loophole because it creates the "perverse" situation where "harassing more people leads to less liability under Title VII."[94] Some courts have avoided the "equal opportunity" harasser problem by finding a factual distinction in the severity or manner of the harassing conduct toward men and women. In *Kopp v. Samaritan Health System*, the Eighth Circuit concluded that the abusive behavior against women was more frequent and more severe—it included physical contact—while the offenses against men involved only verbal behavior.[95] Similarly, in *Steiner v. Showboat Operating Co.*, the Ninth Circuit noted that the harasser referred to men using non-gender-based insults such as "asshole," but he referred to women using gender-based insults such as "dumb fucking broad" and "fucking cunt."[96]

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that discrimination against transgender person is discrimination "based on . . . sex" in violation of Title VII). In addition, the federal government now recognizes sexual orientation discrimination as sex discrimination because it involves discrimination based on gender stereotypes. *See* Exec. Order 13672, 29 Fed. Reg. 42971, 2014 WL 3591760; Complainant v. Anthony Foxx, Secretary, Dept. of Transportation (Federal Aviation Administration), Agency, EEOC DOC 120133080, 2015 WL 4397641 (E.E.O.C. 2015).

91. *See* LINDEMANN & KADUE, *supra* note 21 at 8-52 to -55 (describing cases where harasser's conduct was not "because of" sex because it was directed at both men and women).

92. Holman v. Indiana, 211 F.3d 399, 400–01 (7th Cir. 2000). The Seventh Circuit's use of the equal opportunity harasser rationale is discussed further *infra*, Part IV.B.1.a.

93. *Id.* at 403.

94. David R. Cleveland, *Discrimination Law's Dirty Secret: The Equal Opportunity Sexual Harasser Loophole*, 58 HOW. L.J. 5, 6 (2014). *See* Ronald Turner, *Title VII and the Inequality-Enhancing Effects of the Bisexual and Equal Opportunity Harasser Defenses*, 7 U. PA. J. LAB. & EMP. L. 341, 343 (2005) ("Acceptance of the bisexual and equal opportunity harasser defenses would result in an increase of unchecked and un-remedied workplace harassment, thereby producing an inequality-enhancing effect antithetical to the antidiscrimination purposes and policies of the statute."). *See also* McDonnell v. Cisneros, 84 F.3d 256, 260 (7th Cir. 1996) (Posner, J.) ("It would be exceedingly perverse" if a harasser could help his company avoid liability by "taking care to harass sexually an occasional male worker, though his preferred targets were female").

95. Kopp v. Samaritan Health Sys., 13 F.3d 264, 269 (8th Cir. 1993); *see also* LINDEMANN & KADUE, *supra* note 21, at 8-55 to -56 (describing cases where (1) both men and women subject to nonsexual harassing conduct but only female employee subjected to sexual conduct, and (2) harasser was abusive to both men and women but directed gender-specific animosity toward women).

96. Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994).

Courts have also recognized that the very same harassing conduct toward a man and woman might be uniquely insulting to each of them for different reasons, which therefore makes the conduct actionable. In *Chiapuzio v. BLT Operating Corp*., the district court allowed claims by husband and wife plaintiffs subjected to a male harasser's "sexually abusive remarks" where the harasser described his "sexual prowess and included graphic descriptions of sexual acts [he] desired to perform with various female employees," including the wife plaintiff.[97] The harasser also said he could "do a better job of making love to [the wife] than [her husband] could."[98] The court concluded that "[w]here a harasser violates both men and women, 'it is not unthinkable to argue that each individual who is harassed is being treated badly because of gender.'"[99] The harasser's remarks were "because of" the wife's gender because they communicated the harasser's desire to have sex with her.[100] His remarks were also "because of" the husband's gender because they reflected a desire to demean and harass the husband—as a man—by describing sexual acts the harasser would do the husband's wife.[101]

III.
"HE'S A STUD, SHE'S A SLUT"[102]: THE PROBLEM WITH WORKPLACE RUMORS ABOUT A WOMAN'S SEXUAL PROMISCUITY

A. The Sexual Double Standard Still Exists.

Recent research confirms that the sexual double standard still exists.[103] The sexual double standard "is demonstrated when people endorse notions that women should express their sexuality less freely than men and when women are perceived more negatively for engaging in the same behaviors as men."[104] Researchers have found that a majority of people (85%) agree the double

97. Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1335, 1338 (D. Wyo. 1993).

98. *Id.* at 1335.

99. *Id.* at 1337 (quoting John J. Donahue, *Review Essay: Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1610–11 (1992)).

100. *Id.* at 1338 ("The remarks typically concerned Bell's sexual prowess and included graphic descriptions of sexual acts Bell desired to perform with various *female* employees. Bell never harassed male employees concerning sexual acts he desired to perform with them. Thus, the nature of Bell's remarks indicates that he harassed the plaintiffs because of their gender and constitutes exactly the type of harassment contemplated to fall within the purview of Title VII.").

101. *Id.* at 1337–38 ("Bell intended to demean and, therefore, harm Dale Chiapuzio and Clint Bean because each was male. Bell often made his remarks in front of the plaintiffs, their respective spouses and other employees.").

102. *See* VALENTI, *supra* note 6, at 14.

103. Terri D. Conley, Amy C. Moors & Ali Ziegler, *Backlash from the Bedroom: Stigma Mediates Gender Differences in Acceptance of Casual Sex Offers*, PSYCHOL. WOMEN Q. 00(0), 1–16, 3 (2012); *but see* John K. Sakaluk & Robin R. Milhausen, *Factors Influencing University Students' Explicit and Implicit Sexual Double Standards*, J. SEX RES., 49(5), 473–74 (2012) (concluding that the double standard exists but it is complicated).

104. Conley, Moors & Ziegler, *supra* note 103, at 3.

standard still exists.[105] Even though men endorse the double standard to a greater degree than women, both believe that casual sex—sex outside of a committed relationship—is more acceptable for men than for women.[106]

Sexually permissive[107] women are judged more negatively than sexually permissive men, not just on the basis of sexual morality, but also on a variety of competency measures relevant to a person's success in the workplace. Psychologist Terry Conley and her colleagues found that both men and women rated a woman who accepted a casual sex offer as less competent, less intelligent, and less mentally healthy than a similarly situated sexually promiscuous man.[108] When subjects were asked about how others would perceive them based on whether they accepted or refused a heterosexual casual sex offer, the female subjects believed that they would be "perceived as more intelligent, mentally healthy, physically attractive, socially appropriate, sexually well adjusted, and more positively overall" if they refused the offer.[109] Both men and women judge men more positively for engaging in sexually promiscuous behavior.[110] In fact, male subjects in Conley's study "expected to be perceived as more intelligent, mentally healthy, and sexually well adjusted for *accepting* the [casual sex] offer."[111] Men believed that others would evaluate them negatively if they refused the heterosexual casual sex offer because they could be viewed as "socially inappropriate" or as homosexual.[112] Conley's findings are consistent with other research that suggests that heterosexual males are particularly insulted if they are called "gay."[113]Women have internalized the sexual double standard. Cornell University developmental psychologist Zhana Vrangalova and her colleagues found that female subjects judged sexually

105. Michael J. Marks & R. Chris Fraley, *The Sexual Double Standard: Fact or Fiction?,* 52 SEX ROLES 175, 175 (2005).

106. Susan Sprecher, Stanislav Treger, & John K. Sakaluk, *Premarital Sexual Standards and Sociosexuality: Gender: Ethnicity, and Cohort Differences*, ARCHIVES OF SEXUAL BEHAV. 1395, 1401 (2013).

107. "Sexual permissiveness can be defined as attitudes or behaviors that are more liberal or extensive than what is normative in a social group. It can include actual or desired frequent, premarital, casual, group, or extradyadic sex, sex with many partners, early sexual debut, or even nonverbal cues signalizing availability (*e.g.*, provocative clothing)." Zhana Vrangalova, Rachel E. Bukberg, & Gerulf Rieger, *Birds of A Feather? Not When it Comes to Sexual Permissiveness*, 31(1) JOURNAL OF SOCIAL AND PERSONAL RELATIONSHIPS, 93, 94 (2014).

108. Conley, Moors & Ziegler, *supra* note 103, at 5.

109. *Id.* at 6.

110. *Id.* at 5.

111. *Id.* at 10 (emphasis added).

112. *Id.* Other research suggests that men are justified in these beliefs. *See, e.g.*, Todd G. Morrison, Travis A. Ryan, Lisa Fox, Daragh T. McDermott, & Melanie A. Morrison, *Canadian University Students' Perceptions of the Practices that Constitute "Normal" Sexuality for Men and Women*, 17(4) CANADIAN J. HUM. SEXUALITY 161, 168 (2008) (finding that both male and female study participants considered it more abnormal for men than women to be disinterested in sexual activity, to engage in homosexual fantasy, and to practice sexual activities characterized by submission).

113. Conley, Moors & Ziegler, *supra* note 103, at 6.

permissive women more negatively and viewed them as less suitable for friendship.[114] Female subjects, whether they themselves identified as sexually permissive, believed that a non-permissive woman would be more preferable as a friend than a woman who engaged in casual sex frequently because she would be more emotionally stable and competent (e.g., hardworking, responsible, intelligent, mature), among other desirable attributes.[115] Vrangalova also confirmed the other half of the sexual double standard—that men view promiscuous men as *more* competent and emotionally stable.[116] Her findings suggest that "though cultural and societal attitudes about casual sex have loosened in recent decades, women still face a double standard that shames 'slutty' women and celebrates 'studly' men."[117]

B. Workplace Sexual Rumors About a Woman's Promiscuity Are "Because of" Sex Because They Are Gender-Based Insults

Workplace rumors about a woman's actual or perceived sexual promiscuity qualify as "because of" sex because they are gender-based insults. These types of sexual rumors bring unwanted attention to a woman's real or perceived sexual behavior and accuse her of violating gender-based norms. The need for the various evidentiary routes to determine causation (sexual behavior, gender-based hostility, comparative, gender stereotyping) is particularly apparent with sexual rumors.

A harasser's subjective motive is all the more difficult to ascertain in sexual rumor cases. The origins of a sexual rumor can be unclear and its circulation path can be difficult to trace because "[w]hether one chooses to equate it with a malignant growth, a poisonous vapor, or an information virus, the underlying message is clear: Rumor spreads rapidly, is difficult to control, is invisible yet nearly impossible to ignore, and can have damaging . . . consequences."[118] Sexual rumors in these cases are started by a variety of sources, which are only sometimes identifiable. For example, some cases involved rumors started by anonymous letters to the plaintiffs' superiors.[119] Even if the original source is identifiable, a rumor's tendency to spread quickly and widely makes it difficult to identify all of the people who contribute to its proliferation. Given this difficulty, courts should focus on the gendered nature of the rumor and its effect on a woman in her workplace. Although courts can use any of the evidentiary

114. Zhana Vrangalova, Rachel E. Bukberg, & Gerulf Rieger, *supra* note 107, at 105–06.

115. *Id.* at 105.

116. *Id.*

117. *Women Reject Sexually Promiscuous Peers When Making Female Friends*, SCIENCEDAILY (June 3, 2013), http://www.sciencedaily.com/releases/2013/06/130603142237.htm (quoting the lead author of the study).

118. ALLAN J. KIMMEL, RUMORS & RUMOR CONTROL: A MANAGER'S GUIDE TO UNDERSTANDING & COMBATTING RUMORS 3 (2004).

119. *See, e.g.*, Duncan v. Manager, Dep't of Safety, City & Cty of Denver, 397 F.3d 1300, 1307 (10th Cir. 2005); McDonnell v. Cisneros, 84 F.3d 256, 257 (7th Cir. 1996).

routes outlined to analyze rumors about a woman's alleged promiscuity, analysis based on gender stereotyping is the most fruitful.

Rumors about a woman's sexual promiscuity, even if also about a male employee's sexual promiscuity with the woman, can still be "because of" sex because the rumors are based on gender stereotypes. Due to the sexual double standard, spreading a rumor that a woman is sexually promiscuous is tantamount to calling her a "slut" or a "whore," both of which courts recognize as gender-based insults.[120] As researchers have demonstrated, accusing a woman of being sexually promiscuous calls into doubt her desirability as a competent and professional employee and colleague. This gender-based insult is offensive because it is based on gender-stereotypes that "good" women are not sexually promiscuous.

In contrast, due to the double standard, workplace rumors about a man's alleged sexual promiscuity are less likely to have the same impact on men. Men "are capable of being considered . . . sexual and professional at the same time."[121] The rumors that are more likely to undermine a man's reputation are those about an *absence* of heterosexual sexual prowess—the anti-slut. In a state law sexual harassment case, the New Jersey Superior Court described the different effects that the same sexually demeaning remarks can have on men and women:

> [R]emarks which may be sexually demeaning when made to a woman may not have the same effect when directed toward a man, and vice versa. For example, inferring that an individual had multiple or indiscriminately-chosen sex partners is more likely to be considered an insult when used toward a woman because it suggests that she has loose morals, but may be taken as a compliment to a man's virility. On the other hand, labeling a man a sexual "virgin" can be a humiliating suggestion that he is "less than someone's definition of masculine," . . . while traditionally that label has had no broad negative social connotations for women.[122]

Because sexual rumors refer to alleged sexual activity, a plaintiff can also satisfy the "because of" sex requirement through the sexual behavior evidentiary route. This is especially true in situations where the rumors are one of several types of harassing conduct, including so-called "desire-based" sexual advances. Several courts have implicitly or explicitly recognized that sexual rumors are "because of" sex when the female employee romantically rebuffed her male

120. *See, e.g.*, Flockhart v. Iowa Beef Processors, Inc., 192 F. Supp. 2d 947, 967 (N.D. Iowa 2001) (holding that calling female plaintiff a "slut," "whore," "bitch," and a "cunt" were gender-based).

121. Hébert, *Disparate Impact*, *supra* note 43, at 391.

122. Baliko v. Int'l Union of Operating Eng'rs Local 825, A, B, C, D, & RH, AFL-CIO, 730 A.2d 895, 903 (N.J. Super. Ct. App. Div. 1999).

harasser and/or the rumors were about his own sexual exploits with the female employee. For example, in *Southerland v. Sycamore Community School District Board of Education*, the male harasser made sexual advances toward the female plaintiff, disobeyed his employer's direct orders not to have contact with the plaintiff, and also spread rumors that he was having a sexual affair with the plaintiff.[123] The court denied the defendant's motion for summary judgment, leaving the Title VII decision for the jury to decide.[124] In rejecting the employer's argument that the rumor evidence was inadmissible hearsay, the court reasoned that "[a] reasonable jury could find that [the harasser] was using rumors as a weapon to create a hostile work environment for Plaintiff."[125]

Although the Supreme Court has cautioned that harassment is not "automatically discrimination because of sex merely because the words used have sexual content or connotations,"[126] sexual behavior, even if not desire-based, can degrade or demean women in the workplace. In *Ocheltree v. Scollon Productions, Inc*., the Fourth Circuit recognized that the female plaintiff's male coworkers demonstrated gender-based animus through sexual behavior, which included discussing their sexual exploits with women and "consistently paint[ing] women in a sexually subservient and demeaning light."[127] Similarly, sexual rumors that degrade or demean women can also be considered "because of" sex.

IV.
SEXUAL RUMOR COURT DECISIONS & TITLE VII'S "BECAUSE OF" SEX REQUIREMENT

Courts have answered the question of whether sexual rumors occurred "because of" sex inconsistently. Those courts that have recognized that sexual rumors are "because of" sex most often did so on the basis that those rumors questioned a woman's legitimacy in the workplace. When courts have held that rumors were not "because of" sex, they have often proffered the common reason of the "equal opportunity harasser" spreading rumors about both a male and a

123. 277 F. Supp. 2d 807, 809, 816 (S.D. Ohio 2003)*; see also* Cross v. Prairie Meadows Racetrack & Casino, Inc., 615 F.3d 977, 981 (8th Cir. 2010); Baker v. John Morrell & Co., 382 F.3d 816, 820–23, 828–29 (8th Cir. 2004); Rahn v. Junction City Foundry, Inc., 161 F. Supp. 2d 1219, 1234 (D. Kan. 2001); Quiroz v. Hartgrove Hosp., No. 97 C 6515 1999 WL 281343, at *1–5 (N.D. Ill. Mar. 24, 1999) (after female plaintiff rebuffed male harasser's advances, he began to spread rumors that she was a prostitute).

124. *Southerland*, 277 F. Supp. 2d at 814–15.

125. *Id.* at 816.

126. *Oncale*, 523 U.S. at 80.

127. 335 F.3d 325, 333 (4th Cir. 2003) (en banc). In full disclosure, the author of this article also authored the amicus brief in support of the plaintiff, Lisa Ocheltree. *See* Brief of Amici Curiae Public Justice Center, Women's Law Center of Maryland, D.C. Employment Justice Center, Women's Law Project, and American Civil Liberties Union Women's Rights Project in Support of Plaintiff-Appellee, Ocheltree v. Scollon Prods., Inc., 335 F.3d 325 (4th Cir. 2003) (No. 01-1648), 2003 WL 23872890 (C.A.4).

female.[128] These different approaches towards sexual rumors suggest less of a circuit split than general confusion over the "because of" sex requirement and what to make of sexual rumors, in particular. Therefore, the following section is organized by the type of approach that individual federal courts have taken.

A. Courts Holding that Sexual Rumors about Women are "Because of" Sex

When rumors about a woman's sexual behavior satisfy the "because of" sex requirement despite the fact that the rumor was also about a man, the court concluded that the rumor was uniquely harassing to the woman because it questioned her competency and achievements.[129] The following subsections describe early and important sexual rumor decisions: *Jew v. University of Iowa*[130] (U.S. District Court for the District of Iowa), *Spain v. Gallegos*[131] (Third Circuit), and *McDonnell v. Cisneros*[132] (Seventh Circuit).

128. Other less common reasons that courts held sexual rumors not to be "because of" sex include personal animus toward the plaintiff rather than gender hostility, *see* Brown v. Henderson, 257 F.3d 246, 255–56 (2d Cir. 2001), or that the rumors were true, *see* Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 999, 1001 n.1 (10th Cir. 1996).

129. Several courts have also *implicitly* recognized that sexual rumors are "because of" sex without explaining why. In some of these instances, the rumors about the female plaintiff's sexual promiscuity were part of several different types of harassing conduct and, viewing the conduct in its totality, the courts seemed to have no trouble determining causation. For example, in *Baker v. John Morrell & Co.*, the Eighth Circuit upheld a jury verdict for the female plaintiff on her Title VII sexual harassment claim when her male coworker subjected her to a variety of harassing conduct including: gender-based epithets like "bitch," throwing boxes toward her, shoving, denying her bathroom use, and spreading sexual rumors that he had sex with the plaintiff. Baker v. John Morrell & Co., 382 F.3d 816, 820-23, 828-29 (8th Cir. 2004). *See also* Hare v. H&R Indus., Inc., 67 Fed. Appx. 114, 116–20 (3d Cir. 2003) (affirming bench verdict for plaintiff in hostile work environment case where conduct included touching, sexual comments, and sexual rumors); Rahn v. Junction City Foundry, Inc., 161 F. Supp. 2d 1219, 1228–30, 1234 (D. Kan. 2001) (upholding jury verdict for plaintiff where conduct consisted of sexual comments and other sexual behaviors, offering plaintiff money for her underwear, and sexual rumors); Harley v. McCoach, 928 F. Supp. 533, 536–37, 539–40 (E.D. Pa. 1996) (denying summary judgment to defendant where conduct included rumors, sexual comments, and sexual gestures); E.E.O.C. Enforcement Guidance on Harris v. Forklift Systems, Inc., No. 915.002 (Mar. 8, 1994), http://www.eeoc.gov/policy/docs/harris.html (using factual example where a supervisor's comment about an unmerited promotion because of her appearance and/or her sexual promiscuity became a topic of broader office discussion).

130. Jew v. Univ. of Iowa, 749 F. Supp. 946 (S.D. Iowa 1990).

131. Spain v. Gallegos, 26 F.3d 439 (3d Cir. 1994).

132. McDonnell v. Cisneros, 84 F.3d 256 (7th Cir. 1996).

1. Earliest Sexual Rumor Decision: Jew v. University of Iowa[133]

Dr. Jean Jew, a female associate professor at the University of Iowa, brought one of the earliest and most egregious sexual rumor cases. She endured over ten years of false rumors that she engaged in a sexual relationship with her married, male department head, Dr. Williams, in exchange for favorable treatment.[134] A male faculty member told other faculty, graduate students, and staff that Dr. Jew had been seen having sexual intercourse with Dr. Williams in the workplace, that she and Dr. Williams had been seen together coming out of a motel, and that Dr. Jew received preferential treatment due to that sexual relationship.[135] These are only some of the examples of the rumormongering described in the court's opinion. Indeed, the rumors spread so widely that they circulated outside the department to other parts of the university, the Iowa City community, and faculty at other institutions.[136] Dr. Jew was also subject to gender-based epithets. For example, a male faculty member publicly called Dr. Jew "slut," "bitch," and "whore."[137] Sexually suggestive cartoons, depicting Dr. Jew and Dr. Williams, were also posted in the workplace.[138]

The court concluded that the rumors occurred "because of" sex because they "accused her of physically using her sex as a tool of gaining favor, influence and power with the Head of the Department, a man, and suggested that her professional accomplishments rested on sexual achievements rather than achievements of merit."[139] The fact that the rumors also implicated a man did not stop the court from finding that the harassment occurred "because of" sex. Unlike the rumors about Dr. Jew, "there was no suggestion that Dr. Williams was *using* a sexual relationship to gain favor, influence and power with an administrative superior . . . Were Dr. Jew not a woman, it would not likely have

133. *Jew*, 749 F. Supp. 946. The *Jew* case is, to date, the only trial or appellate court in the Eighth Circuit that has explicitly addressed whether sexual rumors occurred "because of" sex. Other Eighth Circuit cases where the harassing conduct included sexual rumors all appear to have implicitly endorsed that sexual rumors could meet the "because of" sex requirement. *See* Wilkie v. Dept. of Health & Human Servs., 638 F.3d 944, 953 (8th Cir. 2011) (assuming without deciding that rumor that female plaintiff having affair with one of her male subordinates met the Title VII causation requirement); Baker v. John Morrell & Co., 382 F.3d 816 (discussed *supra* note 129); Torres v. Quatro Composites, 902 F. Supp. 2d 1152, 1156, 1164 (N.D. Iowa 2012) (allowing male plaintiff's Title VII racial and sexual hostile work environment claims to proceed when, among other conduct, his female coworker spread a rumor that he was having an affair with another female coworker; court did not discuss "because of" sex requirement). *See also* Rheineck v. Hutchinson Tech., Inc., 261 F.3d 751, 753–56 (8th Cir. 2001) (court implicitly accepted that spreading rumors about a pornographic picture bearing resemblance to the plaintiff could be "because of" sex and instead examined other elements of hostile work environment claim such as the employer's response and whether the rumors were severe or pervasive enough).

134. *Jew*, 749 F. Supp. at 949.

135. *Id.* at 949.

136. *Id.* at 950.

137. *Id.* at 949.

138. *Id.*

139. *Id.* at 958.

been rumored that [she] gained favor with the Department Head by a sexual relationship with him."[140]

2. Bosses Behaving Badly: Spain v. Gallegos[141]

Another oft cited sexual rumor case is the Third Circuit's decision in *Spain v. Gallegos*, where Ellen Spain, an EEOC investigator, became the subject of workplace rumors that she was having sex with her boss for personal gain.[142] Eugene Nelson, Ms. Spain's male boss, met with her frequently to extort private loans from her.[143] When other employees observed these private meetings, it prompted rumors that Mr. Nelson and Ms. Spain were having a sexual relationship.[144] Ms. Spain's coworkers ostracized her and believed that she could get them into trouble due to their perception that she had influence over Mr. Nelson.[145] Ms. Spain asked Mr. Nelson to put the rumors to an end but the private meetings for loan requests continued. Therefore, so did the rumors.[146] The social stigma contributed to Ms. Spain receiving poor performance evaluations, particularly on interpersonal relations measures.[147] Ultimately, due to her poor evaluations, Mr. Nelson denied Ms. Spain a promotion.[148]

The Third Circuit held that the rumors occurred "because of" sex "because the crux of the rumors and their impact" on Ms. Spain is that "a female, subordinate employee, had a sexual relationship with her male supervisor. Unfortunately, traditional negative stereotypes regarding the relationship between the advancement of women in the workplace and their sexual behavior stubbornly persist in our society."[149] Such "stereotypes may cause superiors and

140. *Id.* at 958. The court also commented on the employer's failure to take any meaningful action in response to the behavior, observing that "the situation was not merely one of idle gossip about an alleged office romance. The rumor was that a faculty member was sleeping with her department chairman to advance her professional position." *Id.* at 959. This latter statement by the court has since been applied out of context. Namely, other courts cite to it with respect to the "because of sex" element rather than employer liability. *See, e.g.*, discussion of Spain v. Gallegos, 26 F.3d 439, 449 (3d Cir. 1994), *infra* note 140.

141. Spain v. Gallegos, 26 F.3d 439 (3d Cir. 1994). The only other reported Title VII hostile work environment case in the Third Circuit, to date, that has been presented with sexual rumors evidence is *Harley v. McCoach*, a district court opinion from the Eastern District of Pennsylvania, where the court allowed the female plaintiff's hostile work environment claim to proceed. 928 F. Supp. 533 (E.D. Pa. 1996). The court treated the sexual rumor—that the plaintiff was having an extramarital affair with a male employee—as part of the totality of the circumstances and did not discuss it specifically. *See id.* at 537, 539–40.

142. *Spain*, 26 F.3d at 441–42, 447 (3d Cir. 1994).

143. *Id.* at 442 & 442 n.4.

144. *Id.*

145. *Id.*

146. *Id.* at 442.

147. One supervisor graded Ms. Spain low on the category of integrity due to his perceptions of Ms. Spain's sexual relationship with Mr. Nelson. *Id.* at 442–43.

148. *Id.* at 442.

149. *Id.* at 448.

co-workers to treat women in the workplace differently than men[.]"[150] Had there been a male employee who had repeated close contact with Mr. Nelson, it would have been less likely that coworkers would have thought that the relationship had a sexual basis.[151] Although the rumors also implicated Mr. Nelson in the sexual relations, the court observed that "the rumors did not suggest that his involvement in the alleged relationship had brought him additional power in the workplace over his fellow employees, and the employees had no reason for resenting him in the way they did [Ms.] Spain."[152]

Dicta in *Spain* emphasized the importance of the supervisor's malfeasance in relation to the rumors. The court distinguished Ms. Spain's case from scenarios where the rumors concerned a co-worker's behavior outside the workplace or where rumors developed as a result of employees' misperception of a supervisor's and an employee's frequent but necessary, job-related interaction.[153] The court's language about the supervisor's role in creating and perpetuating the rumors may have been better suited to the severity or pervasiveness of the conduct as well as to the question of employer liability. Indeed, if this reasoning were applied in *Jew*, where Dr. Jew's boss did nothing to contribute to misperceptions of her relationship with him, the court might have answered the "because of" sex question differently.[154]

3. Whores, Sirens, and Circes: McDonnell v. Cisneros[155]

The Seventh Circuit's decision in *McDonnell v. Cisneros*[156] is significant because it was the first sexual rumor case jointly brought by a female and a male plaintiff. Both Thomas Boockmeier, a male supervisor, and his female subordinate, Mary Pat McDonnell, filed claims for sexual harassment based on

150. *Id.*

151. *Id.*

152. *Id.* at 448. The court also referred to *Jew*'s reference to "idle gossip." But instead of using it in the context of employer liability as the Jew case had done, or even in the context of severity or pervasiveness, the Spain court used the language to support its conclusion that the rumors were "sex-based*." Id.* at 449.

153. *Id.* at 448–49.

154. Not all courts have incorporated Spain's emphasis on a supervisor's misconduct in order to recognize that rumors can be "because of" sex. *See, e.g.*, Brown-Baumbach v. B & B Auto., Inc., 437 Fed. Appx. 129, 133 (3d Cir. 2011) ("Although the rumors in the present case do not implicate the stereotype of a woman using her sexuality to gain favor with a supervisor, as occurred in *Spain v. Gallegos*, the present rumors nonetheless contribute to the full panoply of events that could be considered as contributing to the hostile work environment."). *But see* Jackson v. Texas A&M Univ. Sys., 975 F. Supp. 943, 948 n.4 (S.D. Tex. 1996) (distinguishing *Spain* because no allegation of wrongdoing by plaintiff's supervisor).

155. McDonnell v. Cisneros, 84 F.3d 256 (7th Cir. 1996). Before *McDonnell*, the only sexual rumor case in the Seventh Circuit was a U.S. District Court decision that had been a companion case to *McDonnell v. Cisneros* at the trial level. Abeja-Ortiz v. Cisneros, 882 F. Supp. 124, 127 (N.D. Ill. 1995) (granting defendant's motion to dismiss female plaintiff's Title VII claims, based on an "equal opportunity harasser" rationale). Ms. Abeja-Ortiz apparently did not seek appellate review.

156. *McDonnell*, 84 F.3d 256.

the same sexual rumors.[157] The rumors began when anonymous letters were sent to the plaintiffs' employer, the Secretary of Housing and Urban Development (HUD), accusing them of job-related sexual misconduct.[158] The letters made "lurid charges," including an allegation that Ms. McDonnell was Mr. Boockmeier's "in-house sex slave" and that she provided him with sexual favors "in exchange for more rapid promotion and other preferential treatment."[159] The employer used outside investigators, who exacerbated the rumors by indicating to their interview subjects that they believed the rumors were true.[160] Although the plaintiffs were ultimately exonerated, the rumors circulated widely and included additional salacious allegations about incest and Mr. Boockmeier's fathering Ms. McDonnell's child.[161] The rumors made the plaintiffs "pariahs": male employees shunned Ms. McDonnell and female employees shunned Mr. Boockmeier.[162] Mr. Boockmeier was reassigned to the Washington office to dilute the perception that he had a sexual relationship with Ms. McDonnell.[163]

Judge Posner, writing for a panel of the Seventh Circuit, concluded that sexual rumors, even those about a man and woman, can indeed be "because of" sex under Title VII. With respect to Ms. McDonnell's claim, the court reasoned that "[u]nfounded accusations that a woman worker is a 'whore,' a siren, carrying on with her coworkers, a Circe, 'sleeping her way to the top,' and so forth are capable of making the workplace unbearable for the woman verbally so harassed."[164] The court was also willing to acknowledge that the rumors about Mr. Boockmeier could be "because of" sex, placing particular emphasis on the "perverse" results of allowing the employer to avoid liability by invoking an equal opportunity harasser defense.[165] The court was especially concerned with Title VII's purpose of protecting women in the workplace. Judge Posner observed that "[s]exual harassment was brought under the aegis of Title VII's sex discrimination clause because it makes the workplace difficult for women on account of their sex."[166]

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157. *Id.* at 257 (7th Cir. 1996). The suits were brought separately but the lower court consolidated them. McDonnell v. Cisneros, No. 94 C 4440, 1995 WL 110131, at *1 (N.D. Ill. Mar. 13, 1995).

158. *McDonnell*, 84 F.3d at 257.

159. *Id.*

160. *Id.* at 258.

161. *Id.*

162. *Id.*

163. *Id.* The assignment was only temporary at first but was made permanent as punishment for failing to control Ms. McDonnell; i.e., he did not get her to drop her complaints about the rumors. *Id.*

164. *Id.* at 259.

165. "It would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, though his preferred targets were female." *Id.* at 260.

166. *Id.* Judge Posner recognized the potential for same-sex harassment or harassment of men by women, but Posner opined that "these . . . practices . . . do not detract seriously from the fact that sexual harassment is a source of substantial nonpecuniary costs to many working women." *Id.*

With respect to the conduct toward the male plaintiff, the court rejected the employer's "too literal" argument that the harassing conduct was not "because of" sex because it was directed at both a man and a woman.[167] "By a further stretch of the concept a male supervisor for whom life is made unbearable by baseless accusations that he is extorting sexual favors from his subordinates could also be thought a victim of sexual harassment."[168] The court also reasoned that accusations would be "because of" sex because the accusations are based "on the difference in sex between him and the persons he was accused of abusing."[169]

The *McDonnell* decision is not the last word on the equal opportunity harasser defense or sexual rumors from the Seventh Circuit. *McDonnell* predated *Holman v. Indiana,*[170] which, as discussed *supra*, Part II.B.3, recognized an equal opportunity harasser defense. As discussed *infra*, Part IV, the Seventh Circuit has twice considered the "because of" sex requirement in sexual rumor cases since McDonnell.[171]

4. Courts Have Also Recognized that Sexual Rumors Can Be "Because of" Sex in Absence of Allegation that the Woman Was Using Sexual Activity for Personal Advancement

Although early sexual rumor decisions dealt with rumors asserting that the female employee used sex to advance in the workplace, this particular assertion is not a requirement. The courts in the following unreported decisions by courts in the Third and Seventh Circuits have explicitly recognized that rumors about a woman's sexual promiscuity are gender-based insults accusing her of violating gender-based norms of behavior, regardless of whether she allegedly "slept her way to the top."[172]

In *Billings v. Southwest Allen County Schools School Corp.*, the district court determined that sexual rumors could be "because of" sex when the plaintiff's mostly female coworkers spread rumors that she was having sexual

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167. *Id.*

168. *McDonnell*, 84 F.3d at 260.

169. *Id.* This particular rationale seems the weakest and ultimately, least satisfying explanation. If the rumors were about employees of the same sex, this rationale would suggest that the rumors could not establish the "because of" sex requirement.

170. Holman v. Indiana, 211 F.3d 399, 403 (7th Cir. 2000).

171. *See* Venezia v. Gottlieb Memorial Hosp., Inc., 421 F.3d 468 (7th Cir. 2005); Pasqua v. Metro. Life Ins. Co., 101 F.3d 514 (7th Cir. 1996).

172. Without addressing the gender-based norms inherent in sexual rumors, some courts have allowed sexual harassment claims to proceed even though the rumors did not assert that the female plaintiff was having sex for personal advancement. *See, e.g.*, Hare v. H&R Industries, Inc., 67 Fed. Appx. 114, 117–19 (3d Cir. 2003) (rumors female plaintiff was having sex with coworkers without any assertion it was for her personal advancement in the workplace); Southerland v. Sycamore Cmty. Dist. Bd. of Educ., 277 F. Supp. 2d 807, 816 (S.D. Ohio 2003) (same); Rahn v. Junction City Foundry, Inc., 161 F. Supp. 2d 1219, 1228–s29 (D. Kan. 2001) (same); Harley v. McCoach, 928 F. Supp. 533, 537 (E.D. Pa. 1996) (same).

relationships with her male coworkers.[173] The female plaintiff, a school bus driver, brought suit under Title VII for retaliation after she complained about harassing conduct by her coworkers, who called her gender-based insults (e.g., "whore" and "skinny bitch"); spread rumors that she was having an extramarital affair with male coworkers (e.g. that one of the male coworkers fathered the plaintiff's child); suggested she gave "favors" to her doctor in order to get sick leave; and harassed her in other non-gender specific and nonsexual ways (e.g. criticizing her work, reporting her to management, and encouraging other employees to criticize her).[174] The court rejected the employer's argument that the rumors were not because of sex, quoting Judge Posner's language in *McDonnell*. Rumors that a female worker "'is a "whore," a siren, carrying on with her coworkers . . . are capable of making the workplace unbearable for the woman verbally so harassed, and since these are accusations based on the fact that she is a woman, they could constitute a form of sexual harassment.'"[175]

In *Brown-Baumbach v. B & B Automotive, Inc*., the Third Circuit recognized that a rumor about a female plaintiff having a sexual relationship with a male coworker could be "because of" sex even though the rumor did not accuse the plaintiff of having a sexual relationship to advance in the workplace.[176] When the plaintiff complained to her male boss, he blamed her for the misperception because she commuted to work with that coworker.[177] Quoting *Spain v. Gallegos*, the Third Circuit reasoned that the rumors were not equally offensive to the male and female subjects of the rumor because to equate the impact on each of them would "disregard the reality that 'traditional negative stereotypes regarding the relationship between the advancement of women in the workplace and their sexual behavior stubbornly persist in our society.'"[178] The court wrote, "[a]lthough the rumors in the present case do not implicate the stereotype of a woman using her sexuality to gain favor with a supervisor, as occurred in *Spain v. Gallegos*, the present rumors nonetheless contribute to the full panoply of events that could be considered as contributing to the hostile work environment."[179] The court viewed the sexual rumor in the context of the other types of harassing behavior the female plaintiff experienced, which included sexual jokes, berating and insulting remarks, and other rude conduct.[180]

Finally, in *Bogoly v. Easton Publishing Company*, the female plaintiff's male supervisor suggested that she had engaged in casual sexual behavior with a male coworker, "that others might have a similar opportunity with her," and

173. Billings v. Southwest Allen Co. Sch. Corp., No. 1:12-CV-184, 2013 WL 5671055 (N.D. Ind. Oct. 17, 2013).

174. *Id.* at *1–2.

175. *Id.* at *9 (quoting *McDonnell*, 84 F.3d at 259–60).

176. Brown-Baumbach v. B & B Auto., Inc., 437 Fed. App'x. 129, 133 (3d Cir. 2011).

177. *See id.* at 132.

178. *Id.* at 133 (quoting *Spain*, 26 F.3d at 448).

179. *Brown-Baumbach*, F.App'x. 129 at 133.

180. *Id.* at 131–32.

"that her sexual abilities were inadequate."[181] The district court explicitly acknowledged that the conduct was "because of" sex because of the sexual double standard.[182] It reasoned "such references might offend a female employee more than a similarly-situated male, based on society's biased view that women who engage in casual sexual relations are contemptible while sexually-active men are admirable."[183] The court acknowledged that the sexual double standard can make allegations of sexual promiscuity more insulting to a woman than to a man: "We recognize that unfortunately, in our society, conversations between men about sexual behavior might lead to conclusions about a man's 'prowess'—a positive inference—while similar conversations with a female employee about her sexual behavior might engender notions of her promiscuity—a negative inference."[184]

B. Cases Where Courts Held that Sexual Rumors about a Woman's Sexual Behavior Were Not "Because of" Sex

Although several courts have determined that rumors about a woman's sexual promiscuity occurred "because of" sex, not all courts have done so. Rather, the courts concluded that the sexual rumors were not because of sex because they were about a man and a woman's sexual behavior—so-called "equal opportunity harassment."[185]

1. Sexual Rumors about Men and Women as "Equal Opportunity Harassment"

This section discusses three cases where the courts held that the plaintiff's Title VII claim could not proceed because the sexual rumors were about both a man and woman: *Pasqua v. Metro Life Insurance*[186] (Seventh Circuit), *Lewis v.*

181. Bogoly v. Easton Publ'g Co., No. Civ. A 00-CV-6457, 2001 WL 34368920, *1 (E.D. Pa. Nov. 1, 2001).

182. *Id.* at *1. Although the plaintiff was able to meet the "because of" sex requirement, the court granted the defendant's motion for summary judgment because the she could not establish the other elements of a sexual harassment claim, namely that the conduct was severe or pervasive and that the employer failed to take proper corrective action. *Id.*

183. *Id.*

184. *Id.* at *3.

185. Other reasons include personal dislike, *see, e.g.*, Brown v. Henderson, 257 F.3d 246, 255 (2d Cir. 2001) (concluding that sexual rumor about female plaintiff having an extramarital affair with a male coworker were caused by a union dispute rather than "because of" sex); and possible truth of the rumors, *see, e.g.*, Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 999, 1001 n. 1 (1996) (rumors about plaintiff's sexual relationship with her boss based on strong evidence). *But see* Nash v. New York State Exec. Dept., Div. of Parole, No. 96 CIV. 8354 (LBS), 1999 WL 959366 (S.D.N.Y. Oct. 20, 1999) (allowing female plaintiff's Title VII claim to proceed when conduct included rumor that female plaintiff had been a prostitute in the past (true) and that she was recruiting her female coworkers to work as prostitutes (untrue)).

186. Pasqua v. Metro. Life Ins. Co., 101 F.3d 514 (7th Cir. 1996).

Bay Industries[187] (U.S. District Court), and *Duncan v. City of Denver*[188] (Tenth Circuit).

a. The Atypical Sole Male Plaintiff: Pasqua v. Metro Life Insurance

Courts that have held that sexual rumors about a man and woman were not "because of" sex have often relied on *Pasqua v. Metro Life Insurance*,[189] which was decided by a different Seventh Circuit panel later in the same year as *McDonnell v. Cisneros*.[190] *Pasqua* is atypical of most sexual rumor cases because a sole male plaintiff brought it.[191] Donald Pasqua, a life insurance company branch manager, sued his employer based on his employees' rumors that he was "engaged in an intimate relationship" with a female subordinate and that he was showing her favoritism.[192] Men and women in the office circulated the rumors, which spread to other branch offices[193] Both Mr. Pasqua and his female subordinate were upset about the rumors.[194] Mr. Pasqua complained to his employer several times about the rumors and reported that the female subordinate was threatening to file a sexual harassment lawsuit.[195] He was demoted a few weeks later for the purported reason that his branch office was not meeting sales objectives.[196]

187. Lewis v. Bay Indus., Inc., 51 F. Supp. 3d 846 (E.D. Wis. 2014).

188. Duncan v. Manager, Dep't of Safety, City & Cnty. of Denver, 397 F.3d 1300 (10th Cir. 2005) [hereafter "Duncan v. City of Denver"].

189. *Pasqua*, 101 F.3d 514.

190. *See supra* Part IV.A.3 for a discussion of *McDonnell*, 84 F.3d 256.

191. Indeed, it remains atypical in that sense because only four of the sixty-five published and unpublished federal Title VII sexual harassment cases reviewed for this article involved a sole male plaintiff who had been subject to rumors about his sexual promiscuity. *See* Torres v. Quatro Composites, L.L.C., 902 F. Supp. 2d 1152 (N.D. Iowa 2012); Wirtz v. Kansas Farm Bureau Servs., Inc., 274 F. Supp. 2d 1198 (D. Kan. 2003); Dellefave v. Access Temps., Inc., No. 99 CIV. 6098RWS, 2001 WL 25745 (S.D.N.Y. Jan. 10, 2001). One of the four sole male plaintiff cases involved a rumor that the male plaintiff did *not* engage in heterosexual sexual activity. Wirtz v. Kansas Farm Bureau Servs., Inc., 274 F. Supp. 2d 1198, 1204, 1210 (D. Kan. 2003). In *Wirtz*, the rumor about the male plaintiff was that he turned down sex when propositioned by a female coworker. *Id.*

The four sole male plaintiff sexual rumor cases are not to be confused with cases where a male plaintiff sued for retaliation after complaining about sexual rumors about a female employee. *See, e.g.*, Lewis v. Bay Indus., Inc., 51 F. Supp. 3d 846 (E.D. Wis. 2014). In addition, because this article does not include an analysis of cases with rumors about a person's sexual orientation, there are certainly likely to be more sole male plaintiff sexual harassment rumor cases based on sexual rumors about a man's sexual orientation. *See, e.g.*, Schmedding v. Tnemec Co., Inc., 187 F.3d 862, 865 (8th Cir. 1999) (rumors about male plaintiff's sexual orientation).

192. *Pasqua*, 101 F.3d at 515. For example, when the two of them were out of the office at the same time, one of his employees said that Mr. Pasqua was probably at the female subordinate's house "laying her and her new tile." *Id.* at 515 n.1.

193. *Id.* at 515.

194. *Id.*

195. *Id.* at 515–16.

196. *Id.* at 516.

The Seventh Circuit held that Mr. Pasqua's claim could not meet the "because of" sex requirement for a hostile work environment claim because the subject matter of the rumors were about a man and a woman, and "both men and women alike were talebearers."[197] Rumors like this can spread "for any number of reasons having nothing to do with gender discrimination. In addition to what commonly motivates gossip of this type—a fascination with the prurient—perceptions of favoritism on Pasqua's part added fuel to the fire."[198] The court acknowledged that "someone might spread slanderous rumors in the workplace for the simple motivation that someone else was of a particular gender," but Mr. Pasqua's case was "not one of those rarities."[199] Curiously, the court did not rely on *McDonnell v. Cisneros*, although another panel of the Seventh Circuit decided it six months earlier.[200]

Another atypical aspect of *Pasqua* is that very few sexual rumor cases involve a victim who possesses at least some authority to quell the rumors. In its discussion of Mr. Pasqua's retaliation claim, the court expressed concern about the way Mr. Pasqua—the branch manager—handled the situation: "we are puzzled as to why [Mr.] Pasqua neither recommended the transfer of [the female subject of the rumor] to another branch, nor suggested the discipline or discharge of any of the employees who continued to spread rumors in the face of his denials and admonishment to them."[201] The court criticized Mr. Pasqua's "failure to take direct action in response to dissension-inciting gossip" and said this "reflects his overall poor management skills."[202]

Although *Pasqua* is atypical—a sole male plaintiff suing over rumors about his sexual liaison with a female subordinate—courts often cite it to support decisions that sexual rumors cannot meet the "because of" sex requirement.[203]

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197. *Id.* at 517. Since the Supreme Court went on to recognize same sex harassment in *Oncale*, 523 U.S. 75, this aspect of the court's decision seems particularly vulnerable. Both men and women can sexually harass women. The fact that women also spread rumors would indicate that they have internalized the sexual double standard.

198. *Pasqua*, 101 F.3d at 517.

199. *Id.* at 517.

200. Not only is this peculiar in that the two cases both concerned sexual rumors, it contravened Seventh Circuit jurisprudence that the court should give "considerable weight" to the court's prior decisions unless they have been overruled or otherwise undermined by a higher court decision. *See* Haas v. Abrahamson, 910 F.2d 384, 393 (7th Cir. 1990) (quoting Colby v. J.C. Penney Co., 811 F.2d 1119, 1123 (7th Cir.1987)).

201. *Pasqua*, 101 F.3d at 519.

202. *Id.* The suggestion that the proper thing for Mr. Pasqua to do was to transfer the female employee is reminiscent of the employer's criticism of the male boss in McDonnell v. Cisneros for failing to control his female subordinate's complaints about the rumors. Mr. McDonnell was permanently reassigned as punishment for failing to control Ms. McDonnell; i.e., he did not get her to drop her complaints about the rumors. *McDonnell*, 84 F.3d at 258.

203. *See, e.g.*, Ptasnik v. City of Peoria, Dept. of Police, 93 Fed. Appx. 904, 909 (7th Cir. 2004); Holman v. Indiana, 211 F.3d 399, 403 (7th Cir. 2000); Lewis v. Bay Indus., Inc., 51 F. Supp. 3d 846, 854–55 (E.D. Wis. 2014); Reiter v. Oshkosh Corp., No. 09-C-239, 2010 WL 2925916 *6 (E.D. Wis. July 22, 2010); Snoke v. Staff Leasing, Inc., 43 F. Supp. 2d 1317, 1327 (M.D. Fla. 1998).

Two examples of cases that have relied on *Pasqua*'s reasoning are discussed below: *Lewis v. Bay Industries* and *Duncan v. City of Denver.*

b. Female Employee Subject of Sexual Rumors that She was Having an Affair with Her Boss: Lewis v. Bay Industries

In *Lewis v. Bay Industries*, the district court held that workplace sexual rumors about a woman and her boss were not "because of" sex, relying on *Pasqua*'s reasoning.[204] Kyla King became the subject of false rumors after she was promoted from receptionist to "travel manager" in her employer's newly-created travel department.[205] The rumors alleged that Ms. King was having sex with the male president of the company and received a promotion and gifts as a result.[206] Both administrative support staff and upper level executive employees (including, paradoxically, the human resources manager) spread the rumors.[207]

Ms. King also became the target of various disparaging comments, some of which were gender-based. For example, in response to Ms. King's effort to quell the rumors, the company president's son who worked at the company told Ms. King that she was "hated by everyone" and called her "pathetic" and an "insecure child."[208] On another occasion, a male manager told Ms. King he would list her in his cell phone contacts as "Stupid."[209] In an email to the company president, the male General Manager referred to Ms. King as a "Queen Bee"[210] and stated that she was adept at using one of women's "weapons/tools" to "affect the behavior of men," namely "uncontrollable sobbing."[211]

When Ms. King's male coworker, plaintiff Timothy Lewis, complained to management on Ms. King's behalf, he was eventually fired.[212] He filed a retaliation claim under Title VII's anti-retaliation provision, which protects an employee from retaliation for reporting what the employee reasonably believes to be an unlawful employment practice.[213] Even if the employee is mistaken, the complaints may be protected if the employee had a reasonable and good faith belief that the complained-of conduct violated Title VII.[214] The court held that

204. Lewis v. Bay Indus., Inc., 51 F. Supp. 3d 846, 854–55 (E.D. Wis. 2014) (citing *Pasqua*, 101 F.3d at 514–17).

205. *Id.* at 850.

206. *Id.*

207. *Id.* at 850, 856 (rumors spread by female administrative employees, who had worked for company longer than Ms. King and resented her promotion); Plaintiff's Brief in Response to Summary Judgment 3, Lewis v. Bay Indus., Inc., 51 F. Supp. 3d 846 (E.D. Wis. 2014) (1:12-cv-01204-WCG) (asserting that Human Resources Manager (female) and General Manager (male) spread the rumors).

208. *Lewis*, 51 F. Supp. 3d at 850.

209. *Id.*

210. *Id.* at 857–58.

211. Plaintiff's Brief in Response to Summary Judgment, *supra* note 207, at 3.

212. *Lewis*, 51 F. Supp. 3d at 851.

213. *Id.* at 849; *see also* 42 U.S.C. § 2000e-3(a) (1972).

214. *Lewis*, 51 F. Supp. 3d at 854.

Mr. Lewis "could not have reasonably believed that [Ms.] King was subjected to discrimination on the basis of sex."[215]

Relying on *Pasqua*, the court reasoned that the rumors were not "because of" sex because they were about both a male and female.[216] The plaintiff unsuccessfully tried to distinguish *Pasqua* by arguing that Ms. King experienced hostilities disproportionate to those experienced by the male subject of the rumor. The court's "simple answer" to this argument was that the male subject of the rumor was the president and owner of the company and, therefore, no one would believe he obtained an undeserved position through unfair means.[217] The court wrote, "[i]t may be true that [Ms.] King suffered more insults than [the company president], but they were not similarly situated employees—[the president] ran the company, and it is unsurprising that no one teased or insulted him in connection with the rumors."[218]

Although the court acknowledged that the "rumors and complaints were based on the belief, whether true or not, that [Ms.] King had been unfairly given a position she was not qualified to perform" it failed to recognize that the sexual rumors were aimed at Ms. King, calling her competency and achievements into question "because of" sex.[219]

c. Equal Opportunity Harassment Rationale Plus Disaggregation of Conduct: Duncan v. City of Denver

In *Duncan v. City of Denver*,[220] the Tenth Circuit relied on *Pasqua* when it ruled in favor of the employer despite years of harassing conduct. Cynthia Duncan, a police officer with the Denver Police Department for nearly twenty years, sued her employer for enduring years of harassing conduct that included rumors that she was having sex with her superiors. The Tenth Circuit ruled that she could not prevail because, among other reasons, the rumors did not occur "because of" sex.[221] Ms. Duncan detailed numerous incidents of harassment, many of which the court held were time-barred because they occurred in different district locations within the police department, were committed by different perpetrators, and because Ms. Duncan did not file an EEOC complaint until many years later.[222] A sampling of just some of the time-barred conduct

215. *Id.* at 856.

216. *Id.* at 855–56.

217. *Id.* at 856.

218. *Id.*

219. *Id.*

220. Duncan v. Manager, Dep't of Safety, City & County of Denver, 397 F.3d 1300 (10th Cir. 2005).

221. *Id.* at 1315–16 (concluding that allegations such as earlier sexual rumors, rape and death threats, indecent exposure by another officer, attempts to grope and kiss her, and slapping her buttocks were time-barred).

222. *Id.*; *see also* 42 U.S.C. § 2000e-5(e)(1) (1972) (describing deadlines for filing complaint for discriminatory practices).

reveals persistent sexual rumors and other harassing conduct used to denigrate Ms. Duncan's competence as a police officer, including rape threats,[223] indecent exposure and unwanted touching,[224] and rumors that she had sex with her sergeant on the captain's desk.[225]

The conduct that the Tenth Circuit deemed timely, and therefore potentially actionable, included three primary categories: (1) sexual-comments and other nonsexual, disrespectful conduct by a male sergeant whom his lieutenant described as "just hat[ing] women"[226]; (2) various antagonistic but nonsexual behaviors such as removing Ms. Duncan's work product from her desk and failing to provide her timely cover in potentially violent police situations;[227] and (3) rumors that Ms. Duncan was having sex with her superiors.[228] After Ms. Duncan endured these behaviors, her chief ultimately moved her to another district "out of concern for her safety."[229]

The court considered each category separately, despite the requirement that courts examine conduct under the totality of the circumstances in hostile work environment cases. With respect to the sergeant's sexual comments and disrespectful behavior, the court concluded that the employer's response had been adequate.[230] With respect to the second category of antagonistic behaviors, the court, providing no substantive explanation, ignored all but one incident and concluded that the issue did not require "protracted discussion because there is no evidence that this act was motivated by hostility to Ms. Duncan's gender."[231]

The third category of conduct—sexual rumors—involved rumors that Ms. Duncan used sex to advance in the workplace. For example, before Ms. Duncan's assignment to the particular district where the timely conduct

223. *Duncan*, 397 F.3d at 1305 (During Ms. Duncan's earliest years with the force, she received anonymous letters from within the department which "threatened to rape and kill her before cutting up her body and scattering the pieces around the city").

224. *Id.* at 1305–06 (a male officer exposed himself to her and, after she complained, he began spreading rumors that she was engaged in a sexual relationship with him).

225. *Id.* at 1305. In addition, when her male sergeant recommended Ms. Duncan for promotion, the police captain asked the sergeant whether Ms. Duncan was "giving him head." When other sergeants joined in recommending Ms. Duncan, the captain asked all of them if they were receiving sexual favors from Ms. Duncan. *Id.*

226. *Id.* at 1307, 1310. For example, the sergeant discussed Ms. Duncan's sex life in front of other command officers. He also tried to engage Ms. Duncan in sexual banter; for example, he asked if she engaged in oral sex and speculated that she could "jump start a Harley without a kickstand" (apparently a reference to oral sex). He also openly questioned Ms. Duncan's competence and walked out of her roll calls. Other officers who wanted to curry favor with the male sergeant ostracized Ms. Duncan.

227. *Id.* at 1307.

228 Ms. Duncan complained about other incidents as well; *e.g.*, a male superior using the term "woolies" to refer to female genitalia, and anonymous placement of a magazine article from Glamour in her mailbox about why men should be jealous of women. *Id.* at 1311, 1313.

229. *Id.* at 1307.

230. *Id.* at 1310–11.

231. *Id.* at 1314.

occurred, rumors circulated that she was having sex with superiors.[232] On another occasion, "concerned officers" sent an anonymous letter to the mayor with salacious allegations about numerous officers, including Ms. Duncan as well as other male officers.[233] Examples of the assertions about some of the male officers included allegations that one male officer liked drag queens and that another beat his wife.[234] The letter asserted that Ms. Duncan had been sleeping with the deputy chief and had received promotions because of that sexual liaison and that she had also been having sex with another deputy chief.[235] The letter fueled rumors that she had achieved her rank in exchange for sexual favors.[236] Someone sent a second anonymous letter after Ms. Duncan was transferred to another office, claiming that she used sexual relationships with superiors to gain influence.[237]

The court concluded that the sexual rumors about Ms. Duncan were not "because of" sex.[238] The court reasoned that the first anonymous letter was not "because of" sex because it also included allegations about male officers.[239] Similarly, citing *Pasqua*, the court concluded that the second anonymous letter was not "because of" sex because the allegations that Ms. Duncan was having a relationship with a superior male officer did not single her out.[240]

The court's reasoning has two major flaws: its disaggregation of the harassing conduct into separate, unrelated incidents and its failure to recognize the gendered-aspect of the sexual rumors.

First, the court's conclusion that the sexual rumors were not "because of" sex ignored the other abundant timely (and untimely but relevant)[241] conduct that Ms. Duncan endured. Instead, the court disaggregated each of the types of conduct and evaluated them separately. This "divide and conquer" approach is contrary to the Supreme Court's requirement that courts view the totality of the circumstances when considering a hostile work environment claim. Just as courts must examine the work environment under the totality of the circumstances to determine whether it is sufficiently severe or pervasive to constitute an abusive workplace environment,[242] courts should examine harassing conduct as a whole to determine whether the harassment has occurred "because of" sex. As the

232. *Id.* at 1306.
233. *Id.* at 1307.
234. *Id.* at 1312.
235. *Id.* at 1307.
236. *Id.*
237. *Id.* at 1307–08.
238. *Id.* at 1312.
239. *Id.*
240. *Id.*
241. The court also appeared to ignore Supreme Court precedent that allows a plaintiff to use untimely acts as background evidence for her timely claim. *See* Natl. R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002) (Title VII does not "bar an employee from using the prior acts as background evidence in support of a timely claim").
242. Harris v. Forklift Sys., 510 U.S. 17, 23 (1993).

Third Circuit has explained, "[a] play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario."[243] Had the court in *Duncan* viewed the behavior in context and in the light most favorable to Ms. Duncan, as is required during the summary judgment stage, the question of whether the conduct occurred "because of" sex should have been allowed to proceed to a jury.

Second, the court did not recognize the gendered-nature of the sexual rumors about Ms. Duncan. The only sexual rumor case that the court cited was *Pasqua*. Had it examined the more probing decisions which also involved female plaintiffs, such as *Jew*, *Spain*, and *McDonnell*, the court may have at least acknowledged that rumors about a woman's sexual promiscuity call her competence and accomplishments into question and stigmatize her. The court also failed to note that the nature of the rumors about men and women in the anonymous letter were different. For example, one rumor accused a man of sexual interest in drag queens, a reference to the male officer's sexual orientation. The rumor did not accuse the officer of sexual promiscuity; rather, it alleged that he had engaged in non-heterosexual sexual behavior—a violation of the sexual double standard for heterosexual males.

2. Limits on Pasqua's Impact: Venezia v. Gottlieb Memorial Hospital[244]

Although some courts have adopted *Pasqua* in sexual rumor cases, the Seventh Circuit's subsequent decision in *Venezia v. Gottlieb Memorial Hospital, Inc*.[245] limits *Pasqua's* wholesale rejection of Title VII claims based on sexual rumors about both a male and a female. In *Venezia*, the Seventh Circuit distinguished *Pasqua* and allowed a husband and wife to sue their mutual employer for a hostile work environment.[246] The plaintiffs, Frank and Leslie Venezia, both worked for the defendant hospital, although in different departments.[247] The court distinguished both *Holman* and *Pasqua*, holding that the equal opportunity harasser loophole did not apply in this situation because Mr. and Ms. Venezia worked in different settings with different coworkers and reported to different supervisors.[248]

Mr. Venezia, who worked in the maintenance department, was subjected to a variety of harassing conduct, including anonymous notes asserting that his wife

243. Andrews v. City of Philadelphia, 895 F.2d 1469, 1484 (3d Cir. 1990); *see also* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1720–29 (1998) (explaining the harms of disaggregating sexual from nonsexual conduct when assessing hostile work environment claims).

244. Venezia v. Gottlieb Memorial Hosp., Inc., 421 F.3d 468 (7th Cir. 2005).

245. *Id.*

246. *Id.* at 472–73.

247. *Id.* at 469.

248. *Id.* at 471–73.

performed sexual acts in order to get her husband his job.[249] Mr. Venezia's coworkers also left pictures of nude men on his bulletin board, crassly inquired about his relationship with his wife, sent him a pornographic nude photo of a woman that referred to his wife, and subjected him to other nonsexual antagonistic conduct such as spitting on his coat.[250] Ms. Venezia worked as the director of child care for the hospital and also experienced harassing conduct. For example, a male hospital employee spread rumors that Ms. Venezia "'sat on his lap, in the presence of her husband . . . for the purpose of demeaning'" her husband.[251] She also discovered communications directed toward her husband that made reference to her, including a "vulgar" photo of a woman's body.[252]

Although the Seventh Circuit limited *Pasqua's* impact on this sexual rumor case, the court missed the opportunity to recognize the gender-based insults inherent in the harassing conduct. The conduct in *Venezia* is much like that described in *Chiapuzio v. BLT Operating Co.*,[253] discussed *supra* Part II.B.3, where the court recognized that the same harassing conduct can be uniquely insulting to men and women for different reasons. In *Venezia*, the conduct directed toward Mr. Venezia referred to rumors about *his wife's* sexual promiscuity—using sex to get him a job and sitting on another man's lap while he watched. The harassers also sent nude pictures of both men and women to him. The nude picture of the woman referred to Mr. Venezia's wife, which was most likely related to the rumors and conduct suggesting that Mr. Venezia's wife was sexually promiscuous. The nude picture of a man was most likely a gender-based insult relating to Mr. Venezia's masculinity and perhaps questioning his heterosexual sexual orientation. The petitioners alleged that all of this conduct was meant to demean Mr. Venezia as a man.[254] It did not assert that he was sexually promiscuous; rather, the conduct implied that *his wife* was sexually promiscuous and that other men were engaged in sexual activities with her. In contrast, the rumors and suggestions that Ms. Venezia was sexually promiscuous were insulting to her as a woman because of the sexual double standard.

V.
CONCLUSION: RECOMMENDATIONS FOR HOW COURTS SHOULD HANDLE SEXUAL RUMORS IN HOSTILE WORK ENVIRONMENT CASES

Unfortunately, slut-shaming is not just the bailiwick of adolescents. Adults in the workplace do it as well. Women who are made the subject of sexual rumors in the workplace should be able to seek redress under Title VII because the harassing conduct meets the causation requirement that it be "because of"

249. *Id.* at 469.
250. *Id.* at 469–70.
251. *Id.* at 470.
252. *Id.*
253. Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334 (D. Wyo. 1993).
254. *Venezia*, 421 F.3d at 470.

sex. Sexual harassment law has developed beyond merely recognizing sexual behavior as "because of" sex. It has progressed to also recognize that gender-based insults meet the causation requirement. Courts can and should, even under existing jurisprudence, hold that sexual rumors are "because of" sex and proceed to examine the conduct under the remaining hostile environment claim elements (unwelcome, severe or pervasive, and employer liability). In doing so, courts must avoid placing undue emphasis on the element of "because of" sex.

When a court is presented with a sexual harassment case involving sexual rumors about a woman's sexual promiscuity, it should recognize the gendered nature of such rumors. Rumors that allege that a woman is sexually promiscuous accuse her of violating gender-norms for female behavior. They often question her achievements by suggesting that she accomplished them by "sleeping her way" to success rather than through her own skills and merit. And, as research has shown, these sexual rumors have the very real effect of harming a woman's reputation and credibility in the workplace.

These rumors are uniquely insulting to women, even if they also include male employees as their subjects. The "equal opportunity harasser" defense is too literal of an interpretation and fails to recognize the normative gender dynamics at play. Courts have recognized other types of gender-based and gender nonconformity-based harassment under Title VII and should, therefore, also recognize the gender-basis of sexual rumors. Moreover, alleging that a man is sexually promiscuous is not as insulting to a man; in fact, in many instances, it is an accolade. More often than not, sexual rumors about a woman and a man are not a form of equal opportunity harassment. Courts need to stop treating them as such. Courts need not worry that recognizing sexual rumors as "because of" sex will somehow undermine women's sexual agency. Recognizing workplace slut-shaming as actionable under Title VII will not contradict the view that a woman's sexual behavior is her own choice. The remaining elements of a hostile work environment claim will help to avoid paternalism: if a woman does not find the sexual rumors unwelcome and is not subjectively offended, the harassing conduct is not actionable under Title VII. Just like any other sexual harassment case, courts must remember not to place too much emphasis on any one element of a hostile work environment claim. The "because of" sex requirement is only one element of the analysis. The requirement that harassment occur "because of" sex helps separate conduct that violates Title VII from nondiscriminatory conduct. Simply because harassing conduct occurred "because of" sex does not automatically mean that such conduct violates Title VII. Harassing conduct would not constitute a hostile work environment if it was welcomed or it if it were not sufficiently severe or pervasive.[255] Courts must be careful not to equate harassing conduct "because of" sex with *discrimination* because of" sex. This

255. *See, e.g.*, Black v. Zaring Homes, Inc., 104 F.3d 822 (6th Cir. 1997) (holding that comments were sex-based but did not constitute an illegal hostile work environment because the conduct was insufficiently severe or pervasive).

erroneously conflates a single element with the ultimate conclusion of whether there is an actionable sexually hostile work environment.[256] Otherwise, this overemphasis will lead to an overly restrictive interpretation of "because of" sex. If courts remember not to overemphasize the "because of" sex requirement, it is quite possible that some sexual rumor cases may not succeed due to the inability to meet two requirements that are beyond the scope of this article. First, sexual rumors about a woman's promiscuity, under certain circumstances, may not be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[257] Similarly, the employer may not be liable under certain circumstances, e.g., if it took reasonable measures to address the harassing conduct. However, courts should afford plaintiffs the opportunity to demonstrate that the working environment was abusive and the employer failed to take proper actions, rather than determining that sexual rumors were not "because of" sex.[258]

Courts in sexual rumor cases must also remember that, just as in any other sexual harassment case, conduct must be viewed in its totality, rather than separately. Courts must avoid disaggregating conduct when determining whether it is "because of" sex. In any hostile work environment sexual harassment case, courts must view the totality of the circumstances. Cases often involve several different types of harassing conduct; e.g., sexual advances, sexually explicit comments and behavior, gender-based epithets, gender-based comments, gender-stereotyping, and even nonsexual and non-gender based antagonistic actions. If courts heed the requirement to consider the totality of the behavior, including sexual rumors, the "because of" sex requirement may be met, at least sufficiently to submit the question to a jury. Courts that view each metaphorical "tree" separately and independently will fail to see the "forest." The question of whether rumors about a man's heterosexual sexual promiscuity can be "because of" sex is admittedly more difficult and merits a more in-depth discussion.[259] Due to the sexual double standard, those types of rumors are not nearly as insulting as they are to women. Rumors about a man's failure to conform to the sexual double standard, such as rumors that he lacks sexual prowess, are more clearly gender-based. The question of whether a man who is the subject of rumors that affirm his heterosexual sexual prowess are "because of" sex do not

256. *See* Schwartz, *supra* note 38, at 1761–62.

257. *See* Schwartz, *supra* note 38, at 1738–39 ("The notion that a restrictive interpretation of causation is needed to keep cases like this from turning Title VII into a 'civility code' ignores the other requirements of a sexual harassment claim, namely, that the conduct must be severe or pervasive").

258. *Harris*, 510 U.S. at 23.

259. Also beyond the scope of this article are the following sexual rumor issues: what types of sexual rumors can meet the severe or pervasive requirement, how employers should respond to workplace rumors in order to avoid liability, and whether rumors based on truth or motivated by personal animosity can be "because of" sex.

fall so easily into the evidentiary route of gender-based insults as do similar rumors about women.[260]

Ultimately, it is important to keep in mind that the male sexual rumor plaintiff cases make up a very small percentage of the sexual rumor hostile work environment cases. Therefore, they should not be the proverbial tail that wags the dog. For that reason, courts' continued reliance on *Pasqua* in female plaintiff sexual rumor cases is misplaced. The most atypical sexual rumor case should not set the general rule for women who are slut-shamed in the workplace for alleged acts of sexual promiscuity.

260. Some scholars have proposed solutions that may help answer that particular question. *See, e.g.*, Schwartz, *supra* note 38, at 1705 (advocating a return to the "sex per se" rule where "sexual conduct in the workplace is always, without more, "because of sex"); Cleveland, *supra* note 94, at 45–46 (advocating amending Title VII or passing new legislation to broaden anti-discrimination protections to categories of sexual orientation and gender identity); Brady Coleman, *Pragmatism's Insult: The Growing Interdisciplinary Challenge to American Harassment Jurisprudence*, 8 EMPLOYEE RTS. & EMP. POL'Y J. 239 (2004); David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2000).